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AN EXPOSITION

OF THE

PRINCIPLES of PARTNERSHIP.

BY

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PREFACE.

I wish to express my acknowledgement to DWIGHT M. LOWREY, Esq., for the aid he has cordially given me in preparing for publication the materials I had collected, and the manuscript I had draughted, during the alternate years since 1873, for the double purpose of my lectures upon the subject of partnership and of this present work. The suggestions and the criticisms which he made in the course of the final revision have contributed to clear up some of the principles of Partnership law, and to clinch the argument advanced for several propositions.

JAMES PARSONS,
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January, 1889.

TABLE OF CONTENTS.

PART I.

ASSUMING THE POSITION OF A PARTNER, OR WHAT CONSTITUTES A PARTNER.

CHAPTER I.

ORIGIN AND GROWTH OF PARTNERSHIP.

At Roman law, a bargain between the partners; at Common law, a basis for dealing with third persons. § 1. A *status*, not a contract-relation. § 1. Property the foundation of partnership, and sufficient to charge the proprietor. § 3. The contribution shows a proprietor, and measures his capacity. § 4. Law Merchant gave power to buy and sell. § 5. Commercial paper, when confined to trade transactions, made payees partners. § 6. Relation extended from trade to "business." § 7. Land became merchandise. § 8. Title controlled by firm. § 9. Statute of Frauds prevents oral partnership for trading in land. § 10. Building operation. § 11. Landlord and tenant. § 12. Parties convert land into article of traffic. § 13. Non-commercial partnership. § 14. Mining partnership. § 15.

CHAPTER II.

THE ANTECEDENTS OF PARTNERSHIP.

Object, gain, not merely a benefit. § 16. Parties fix commencement of partnership. § 17. Postponement at option. § 18. Contribution partner's separate obligation. § 19. Incoming partner makes no contribution. § 20. Terms for jury, effect for court. § 21. No contract unless terms settled. § 22. Intention insufficient. § 23. *De facto* corporation a partnership. § 24. Contribution, for duration of partnership, and carries temporary ownership. § 25. Special partnership, type of commercial partnership. § 26. No partnership in profits, unless in the stock. § 27. Increase or decrease of contribution, for or against firm. § 28. Title to contribution between partners. § 29. Partnership converts its subject-matter into merchandise. § 30. Property rights de-

pend on theory of contribution. § 31. Debt theory of contribution. § 32. True theory. § 33. Loss, total or partial, shared according to contribution. § 34, § 35. Ratio of profits, for jury. § 36. Special partner's contribution. § 37. Contribution by non-owner. § 38. By trustee. § 39. *Cestuy que trust's* right to follow fund. § 40. May waive tort and sue in *assumpsit*, § 41, to recover fund and profits. § 42. Difficulty of ascertaining profits no answer to *cestuy que trust's* claim. § 43.

PART II.

THE PRINCIPLES WHICH REGULATE PARTNERSHIP DURING ITS EXISTENCE.

CHAPTER I.

THE CONSTITUENTS OF PARTNERSHIP.

As to liability, partners only joint contractors. § 44. Act sufficient to charge; intention not necessary. § 45. In joint transactions parties held on implied contract. § 46. Withholding property charges parties in contract. § 47. Partnership as to third persons, the legal conception of partnership at the present day. § 48. The business gives commercial privileges. § 49. The intention of partners creates relation between them, and charges them as to third persons. § 50. Property the medium of partnership, and partners proprietors. § 51. Sharing profits by proprietors. § 52. Title to profits depends on ownership. § 53. *Indicia* of ownership establish partnership. § 54. Title to profits a property right. § 55. Roman type survives in Common law. § 56. Property the link between profits and contribution. § 57. Compensation out of profits confounded with title to profits. § 58. 'Sharing' ambiguous, and law re-established by limiting term to sharing as proprietor. § 59. Distinction between profits and sum equal to profits founded on twofold meaning of 'sharing.' § 60. Parties sharing profit and loss are not partners unless proprietors. § 61. Parties sharing gross profits not partners. § 62. Commission on sales like share of gross profits. § 63. Lender taking profits not a partner. § 64. Amount of interest or profits not a test. § 65. Usurious rate does not change the loan into a partnership. § 66. Inference against a partnership. § 67.

CHAPTER II.

SUB-PARTNERSHIP.

Delectus personæ confined to relation between the partners. § 68.

CHAPTER III.

HOLDING OUT.

Holding out charges the party held out. § 69. Nominal partner liable in joint action with partner in fact. § 70.

CHAPTER IV.

EXECUTORS AND ADMINISTRATORS AS PARTNERS.

Executor may succeed partner, § 71, or distributees become special partners. § 72. Unless executor, or administrator, renounces, charged as partner. § 73. May limit contribution of deceased partner's estate. § 74. Whether executor or administrator a partner, determined by his acts. § 75.

CHAPTER V.

NATURE OF THE CONTRACT MADE BY THE FIRM IN TRANSACTING ITS BUSINESS WITH THIRD PERSONS.

Partners may have collective name, except in legal proceedings. § 76. Procedure of Law Merchant not adopted by Common law. § 77. Contract by partners, though joint in form, several in substance. § 78. No formula prepared for partners' obligation. § 79. As Court did not re-model process, Legislature rectified it. § 80. Joint process extinguished the several liability of partners. § 81. Pennsylvania Legislature corrected abuse of legal process by preventing merger in joint actions. § 82. Courts did not extend remedy beyond joint actions. § 83. Merger, though plaintiff did not know of partner's membership, and kept from knowing it by the partner. § 84. Right against each partner frustrated by the process. § 85. Death of partner released his estate. § 86. Death pending suit deprived plaintiff of recourse against the estate. § 87. Pennsylvania Acts prevented failure of process by partner's death pending suit, § 88, also severed a judgment, so that it bound deceased partner's representative as well as surviving partner. § 89. The Statutes recognize several liabilities. § 90. Creditor entitled to both joint and several remedies for satisfaction. § 91. Lord MANSFIELD showed that joint contract was an aggregate of separate contracts. § 92. MARSHALL carried out the severance. § 93. Modern practice admits the several cause of action. § 94. There is no joint liability apart from the several liabilities of the partners. § 95. As the firm is nothing but a phrase, the contracts must be separate. § 96.

CHAPTER VI.

THE TITLE TO FIRM PROPERTY.

Co-ownership mutual restriction upon the owners. § 97. Joint tenancy the transition from communal to individual ownership. § 98. Joint

tenancy adapted to commercial purposes for partnership. § 99. The joint estate creates the creditors' rights. § 100. Partnership, a *status*. § 101. It does not derive its distinctive features from contract. § 102. Partners' estate, a joint tenancy. § 103. Tenancy in common inconsistent with relation. § 104. Marshalling assets excludes tenancy in common. § 105. Partner's equity protects his separate estate, and founds firm creditors' rights. § 106. Destination, outgrowth of joint tenancy § 107. Firm creditors' preference not based on any theory of credit. § 108.

CHAPTER VII.

THE TITLE TO PARTNERSHIP LAND.

Conversion and lien, expedients for overcoming tenure. § 109. Land may be treated as firm assets, without any fiction. § 110. Purchaser without notice, but not creditors, rely on legal title. § 111. Except under Pennsylvania record-system, creditors show that firm has beneficial ownership. § 112. In Pennsylvania legal title protects not only judgment, but general, creditors. § 113.

CHAPTER VIII.

THE IMPLIED POWER OF A PARTNER.

Partner, authority to sell firm stock, § 114, to buy for the business. § 115. Implied authority restricted to simple contracts. § 116. Not by specialty. § 117. Seal, surplusage only if express authority. § 118. Partner cannot appear for firm, § 119, or submit to arbitration, § 120, but represents firm, and may bind it by admission. § 121. Partner cannot bind co-partner by confessing judgment against firm. § 122. Partner may borrow amount usual in the given business. § 123. May issue or use commercial paper, § 124, but not accommodation paper. § 125. Partner's authority by commercial paper defined, not by partnership principles, but by those peculiar to commercial paper. § 126. The form of commercial paper conveys no notice of the character of the transaction. § 127. Firm's receipt of consideration will not change character of individual transaction. § 128. Partner cannot guarantee debt of another. § 129. Set-off a medium of equity. § 130. Partner cannot assign for firm creditors. § 131. Assignment *prima facie*, a dissolution. § 132. Partners cannot restrict co-partner's authority, § 133, except by agreement, and as to themselves. § 134. Partners may ratify co-partner's act in excess of his authority. § 135. Infant partner must disaffirm at majority, or be liable for past and future acts. § 136. Infant partner's position determined not by contract with partners, or third persons, but entirely by his property rights. § 137. Married woman not a partner unless permitted to be by statute. § 138.

CHAPTER IX.

THE LIABILITIES OF A PARTNER.

Partner answers for co-partner's tort, § 139, unless firm but the occasion for his tort. § 140. Trustee-partner's use of fund in the firm charges his co-partners. § 141. Special made general partner by neglect, liable for co-partner's tort. § 142. Partner criminally liable for misappropriation of firm property. § 143.

CHAPTER X.

CHANGE OF PARTNERS.

Incoming partner cannot be charged, nor can he ratify previous act of firm. § 144. The theory of trust and consideration is superceding the necessity of novation. § 145. Retiring partner remains liable until released. § 146. His liability, foundation of his equity. § 147. Continuing firm not an assignee for creditors. § 148. Novation requires a new partner. § 149. Incoming partner personally liable to firm creditors on his agreement to assume the debts. § 150.

CHAPTER XI.

THE RELATION OF PARTNERS.

Requires utmost good faith. § 151. Equal power among partners in dealing with outsiders; in domestic administration, majority controls. § 152. During partnership no litigation between partners. § 153. Partner cannot pay firm debt and substitute himself for the creditors. § 154. Partner cannot sue co-partner for mismanagement. § 155. No set-off between partners, except in the account. § 156. Account-stated equivalent to decree in account. § 157. As transaction independent of firm account, partners are strangers. § 138. Also account for isolated transactions lies during partnership. § 159. Procedure prevents suits between the partner and his firm. § 160. Obstacle of procedure removed by statute in Pennsylvania. § 161. Equitable remedy not taken away. § 162. But difficulty inherent. § 163. Common partner means different capacities. § 164. Partner as proprietor and creditor has priority for his advances. § 165. Partners may recover amount converted by co-partner from his separate estate. § 166. They may avoid act which is in excess of his authority. § 167. They need not dissent from his use of firm credit, or firm funds, for his individual account. § 168. A partner may re-assert the joint title, or the partners may ratify a co-partner's misappropriation. § 169. But the fraud must be committed against the firm. § 170. Partner may dispose of his share as he likes. § 171. May mortgage, or alien it absolutely. § 172.

TABLE OF CONTENTS.

PART III.

THE PRINCIPLES ACCORDING TO WHICH THE BUSINESS IS WOUND UP.

CHAPTER I.

THE REASONS FOR A DISSOLUTION.

Dissolution only for adequate cause. § 173. Partner's remedy for premature dissolution, an action for the breach of contract. § 174.

CHAPTER II.

HOW DISSOLUTION IS BROUGHT ABOUT.

Notice necessary to revoke partner's implied authority. § 175. Different kinds of notice. § 176. Customers must have actual notice. § 177.

CHAPTER III.

THE EFFECT OF DISSOLUTION.

Dissolution ends partner's authority, § 178, and divides joint title into separate titles. § 179.

CHAPTER IV.

THE APPOINTMENT OF A RECEIVER.

Appointment of receiver not always necessary. § 180. Receiver, of course against partner's vendee. § 181. Partner forfeits right to receiver by laches. § 182.

CHAPTER V.

LIQUIDATION.

Firm continued only for liquidation. § 183. Liquidating partner represents firm for settlement. § 184. If no liquidating partner, any partner may bind co-partners for liquidation. § 185. Retiring partner gives up right to liquidate. § 186. Partner's power, coupled with interest, and irrevocable; stranger's revocable. § 187. Liquidating partner not entitled to compensation. § 188. General creditors control liquidating partner. § 189. Liquidating partner displaced only by necessity for receiver. § 190.

CHAPTER VI.

MARSHALLING THE ASSETS.

Theories to explain marshalling. § 191. Firm creditors reclaim assets from separate creditors. § 192 Equity interferes only when a creditor

has two funds. § 193. Firm creditors' equity rests on partner's legal liability. § 194. Equity could not take away firm creditors' right, and only controls the exercise of it against the separate estate. § 195. Equity does not interfere with firm creditors, except when they have a joint fund. § 196. The restriction protects nothing but the separate estate. § 197. Creditor partner's independent claim against co-partner not enforced until firm debts are paid. § 198. If there would be no surplus out of debtor-partner's separate estate, recovery might be had on independent claim. § 199. Firm creditors may become separate creditors of partner who bought out co-partner. § 200. Partner may compete with separate creditors of co-partner. § 201. Partner's debt to firm not an asset. § 202. Surviving partner's indebtedness to firm would not prevent firm creditors from collecting debts out of deceased partner's estate. § 203. Exemption at law of deceased partner's estate did not enable his representative to recover his share in competition with firm creditors. § 204. A common member furnishes no basis for marshalling. § 205.

CHAPTER VII.

ACCOUNT.

Account, an epitome of partnership. § 206. Basis of account, joint property, partner's liability for firm obligations, and good faith. § 207. Advances have priority. § 208. Good-will an asset. § 209 Disbursements on firm account, items of credit. § 210. No account of illegal business. § 211. Partner must account for a breach of good faith. § 212. Account barred by Statute of Limitations, or by laches. § 213. Outside transactions not included in account § 214. Decree for account. § 215. Jurisdiction of account. § 216.

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Ackland *a*. Trethewy, 2 Saunders 48, - - -	103,	7,	1669.
Abrams *a*. Stewart, 7 Watts, 448, - - -	94, 95,	*b*, *b*.	1838.
Adams *v*. Beall, 8 A. Rep'r 664, - - - - - -	137,	5,	1887.
Adams *v*. Howell, 68 N. Y. 315, - - - - -	177,	4,	1877.
Adams *a*. Lothrop, 135 Mass. 469, - - - - -	140,	4,	1882.
Adams *v*. May, 27 Fed. R. 907, - - - - -	76,	1,	1886.
Adams *v*. McKesson, 3 Sm. 81, - - - - -	12,	1,	1866.
Adams *a*. Walsh, 3 Denio. 125, - - - - - -	104,	10,	1846.
Addison *a*. Loeschick, 3 Rob. 331, - - - - -	192,	1,	1865.
Aigen *v*. B. & Me. R. R,, 132 Mass. 423, - - - -	62,	*e*,	1882.
Ainey's Appeal, 11 W. N. C. 568, - - - - -	216,	1.	1882.
Alberger *a*. Bank (Steuben Co.), 101 N. Y. 202, -	126,	5,	1886.
Alderson *v*. Pope, 1 Camp. 404, n., - - - - -	134,	3,	1811.
Alexander *v*. Gorman, 7 A. Rep'r 243, - - - -	105,	3,	1886.
Alexander *v*. Morgan, 31 Ohio St. 546, - - - -	138,	3,	1877.
Allen *a*. Dickey, 1 Gr. Ch. 40, - - - - -	215,	2.	1838.
Allen *a*. Meech, 17 N. Y. 300, - - - - - -	193,	2,	1858.
Allen *a*. Morris, 1 McCart. Ch. 44, - - - - -	165,	4,	1861.
Alter *a*. Scull, 1 Harr. 147, - - - - - -	170,	4,	1837.
Altheimer *a*. Bank (4 Nat. of St. Louis) 3 S. W. Rep'r 858,	59,	1,	1887.
Altvater *a*. Kenney, 27 Sm. 34, - - - - - -	177,	1,	1874.
Allen *a*. Ellis, 2 S. Rep'r 676, - - - - - -	114,	2,	1887.
Allen *a*. Richards, 44 Leg. Int. 432, - - - - -	113,	6,	1887.
American Loan and Tr. Co. *a*. Ricker, 140 Mass. 346,	16,	6,	1885.
Ames *a*. Herrick, 8 Bosw. 115, - - - - - -	215,	3,	1861.
Amsinck *v*. Bean, 22 Wallace 395 - - - - -	106, 106, 107,	2, *b*, 9, *d*, 2,	1874.
Amsink *a*. Dingman, 27 Smith 114 - - - - -	88, 88,	3, 6,	1874.
Anderson *v*. Levan, 1 W. & S. 334, - - - - -	83,	3,	1841.
Anderson *v*. Maltby, 4 Br. Ch. 422; s. c. 2 Ves. Jr. 244,	106,	2, *a*,	1793.

Table of Cases.

Anderson *v.* Pollard, 62 Geo. 46,	86,	6,	1878.
Andrews *a.* Foster, 2 P. & W. 160,	168,	1,	1830.
Andrews *v.* Pugh, 24 L. J, Ch. 58,	59,	*g*,	1855.
Andrews *v.* Wilcoxon, 25 Ch. Div. 505,	205,	3,	1884.
Angell *a.* Arnold, 62 N. Y. 508,	65,	1,	1875.
Angle *a.* Shibley, 37 N. Y. 626,	23,	3,	1868.
Anshutz *v.* Fitzsimmons, 9 Barr 180,	169,	3,	1848.
Anson *a*, Vice, 7 B. & C. 409,	23,	5,	1827.
Appleby *a.* Hawkins, 2 Sandf. 421,	140,	3,	1849.
Applegate *a.* Van Brunt, 44 N. Y. 544,	112,	18,	1871.
Arbendroth *a.* Durant, 69 N. Y. 148, 97 N. Y. 132,	37,	3, *j*,	1877. 1884.
Argall *v.* Smith, 3 Denio 435,	37,	3, *g*,	1846.
Armstrong *a.* Higgins, 10 Pac. R. 232,	15,	4,	1886.
Armstrong *a.* Fettrecht, 5 Rob. 339,	178,	5,	1868.
Arnold *v.* Angell, 62 N. Y. 508,	65,	1,	1875.
Arnold *a.* Cochran, 8 Sm., Pa., 399,	24,	5,	1868.
Arnold *a.* Patterson, 9 Wr. 410,	24,	4,	1863.
Arthurs *a.* Kramer, 7 Barr 165,	8, 109,	2, 7,	1847.
Ash *v.* Guie, 1 Out. 493,	16,	1,	1881.
Ashton *a.* Robinson, 20 Eq. 25,	28,	2,	1873.
Aspinwall *v.* Williams, 1 Ohio 84,	17, 115,	1, 2,	1823.
Astor *a.* Ogden, 4 Sandf. 311,	54,	1,	1850.
Assurance Co. (London) *v.* Drennen, 113 U. S. 51, 116 U. S. 461,	23, 23,	3, 3,	1885. 1886.
Attorney General *v.* Hubbuck, 10 Q. B. D. 488, 13 Q. B. D. 275,	109, 109,	4, 4,	1883. 1884.
Atwell *a.* Morrison, 9 Bosw. 503,	170,	2,	1862.
Atwood *v.* Impson, 5 C. E. Gr. 151,	106,	1, *a*,	1869.
Austerick *a.* Russell, 1 Sim. Ch. 52,	151,	4,	1826.
Austin *v.* Holland, 69 N. Y. 571,	177,	2,	1877.
Austin *v.* Williams, 2 Ohio 61,	44, 76,	7, 25,	1825.
Autin *v.* Townsend, Pen. 744,	76,	4,	1811.
Averill *v.* Loucks, 6 Barb. 19,	93, 110,	1, 10,	1849.
Avery *v.* Myers, 60 Miss. 368,	75,	2,	1882.
Axtell *a.* Young, 2 H. Bl. 242, *arg.*	58,	*g*	1784.
Ayer *a.* Smith, 13 Otto 320,	74,	5,	1879.
Azel *v.* Betz, 2 E. D. Smith 188,	17,	3,	1853.

Bacheller *a.* Lawrence, 131 Mass. 504.	37,	3, *a*,	1881.
Badeley *v.* Consolidated Bank, 38 Ch. D. 238,	Intro.		1888
Bagley *v.* Smith, 10 N. Y. 489,	174, 212,	2, 3.	1853.
Bailey *a.* Cushman, 1 Hill 526,	58,	*f*,	1841.
Bailey v. Edwards, 116 Eng. C. L. Rep. 775, n.,	90,	3,	1866.
Bailey *a.* Moriarty, 46 Conn. 592,	167,	5, *a*	1879.
Bailey *a.* Read, L. R. 3 App. Cas. 94,	197, 202, 205,	2, 1, 1, s, 5,	1887.
Bain *a.* Goulding, 4 Sandf. 716,	173,	5,	1852.
Baker *a.* Wetmore, 9 Johns. 307,	62,	*f*,	1812.

Table of Cases.

Baldwin *v.* Burrows, 47 N. Y. 199, - - - - -	23,	1,	1872.
Baldy *v.* Brackenridge, 2 S. Rep'r 410, - - -	140,	3,	1887.
Ballentine *v.* Frelinghuysen, 38 N. J. Eq. 266, -	28,	3,	1864.
Ballou *v.* Spencer, 4 Cow. 163, - - - - - -	8,	1,	1825.
Banco de Portugal, ex parte, 11 Ch. Div. 317, - -	164,	2,	1879.
Banco de Portugal *v.* Waddell, 5 Appeal Cases 161, -	164,	2,	1880.
Bank, Agr. & Mfrs., *v.* Stambaugh, 13 S & R. 299, -	106,	8, *d*,	1825.
Bank, Am. Nat., *a.* Blodgett, 49 Conn. 9, - - -	74,	1,	1881.
Bank, Belleville Sav., *a.* Winslow, 30 F. 488, - -	85,	1,	1887.
Bank, Catskill. *v.* Gray, 14 Barb. 471, - - -	58,	1 *f*,	1851.
Bank (Central City Saving) *v.* Walker, 66 N. Y. 425,	24,	3,	1877.
Bank, Citizens', *v.* Hine, 49 Conn. 236, - - -	23,	3,	1881.
Bank, Consolidation. *a.* Miller, 12 Wr. 514, - -	127,	5,	1865.
Bank *v.* Cushing, 53 Vt. 321, - - - - - -	197,	1,	1881.
Bank *v.* Dakin, 24 Wend. 411, - - - - - -	44, 76,	5, 22,	1840.
Bank, Fayette Nat., Lexington, *v.* Kenney, 49 Ky. 133,	195,	4,	1880.
Bank, Gainesville Nat., *a.* Stevens, 62 Texas 499, -	51,	1,	1884.
Bank, Lancaster, *v.* Myley, 1 Harris 544, - -	109,	7,	1850.
Bank *v.* Monteath, 1 Denio 402, - - - - - -	44,	8,	1845.
Bank *v.* Norris, 43 L. I. 56, - - - - - -	68,	2,	1886.
Bank of Bellows Falls *a.* Washburn, 19 Vt. 278, -	106, 108,	8, *c*, 2,	1847.
Bank of Commonwealth *v.* Mudgett, 44 N. Y. 514, -	126,	4,	1871.
Bank of Middletown *a.* Haldeman, 4 Cas. 440, - -	127,	6,	1857.
Bank of Mt. Pleasant, *a.* McKee, 7 Ohio 463, - -	117,	4,	1836.
Bank of New York *v.* Vanerhorst, 32 N. Y. 553, -	103,	2,	1865.
Bank of U. S. *a.* Cramond, 1 Binn. 64, - - -	130,	16,	1803.
Bank, Steuben Co., *v.* Alberger, 101 N. Y. 202, - -	126,	5,	1886.
Bank *v.* Sawyer, 38 O. S. 339, - - - - - -	19,	3,	1882.
Bank *a.* Templar, 26 Fed. Rep'r 580, - - - -	178,	1,	1886.
Bank, The Cecil, *a.* Bowman, 3 Gr. 33, - - -	127,	2, *b*,	1859.
Bank, 1 Nat. of Alleg., *v.* F's Deposit Bk., 5 C. Rep. 505,	74,	5,	1886.
Bank, 1st Nat. of Greensville, *a.* Buzzard, 2 S. W. Rep. 54,	44,	4,	1886.
Bank (1st Nat.) *v.* Bissell, 2 McCrary 73, - - -	15,	4,	1885.
Bank, 4th Nat. of St. Louis., *v.* Altheimer, 3 S.W. Rep. 858,	59,	1,	1887.
Bank's Appeal (York Co.), 8 Casey, 446, - - -	25, 106,	3, 8, *j*,	1859.
Banks, ex p., 1 Atk. 106, - - - - - - -	197,	1,	1740.
Baker *v.* Dawbarn, 19 Grant's Ch. 113, Up. Can. -	192,	3,	1872.
Baker's Appeal, 9 Harris 76, - - - - - -	107,	3,	1853.
Barber *a.* Suydam, 6 Duer 34, - - - - - -	84,	4,	1856.
Barber *a.* Durbin, 14 Ohio 311, - - - - - -	112,	4,	1846.
Bardwell *v.* Perry, 19 Vt. 292, - - - - -	108, 195,	6, 2,	1847.
Barge *a.* Osborne, 29 Fed. Rep'r 725, - - - -	131,	4,	1887.
Barker *v.* Mayo, 129 Mass. 517, - - - - - -	165,	4,	1880.
Barker v. Parker, 1 T. R. 287, - - - - - -	71,	1,	1786.
Barlow *a.* Noakes, 26 L. T. 136; 20 W. R. 388, - -	71,	1,	1872,
Barnard, in re, 32 Ch. D. 44, - - - - - -	126,	2,	1886.
Barnes *v.* Barrow, 61 N. Y. 39, - - - - - -	129,	1,	1874.
Barnes *a.* Foster, 31 Sm. 377, - - - - - -	113,	1, *f*,	1876.
Barrow *a.* Barnes, 61 N. Y. 39, - - - - - -	129,	1,	1874.
Barrow *a.* Jenkins, 35 N. W. Rep'r 510, - - - -	156,	1,	1887.
Barry *v.* Nesham, 3 C. B. 641, - - - - - -	58,	*c*,	1841.
Barthan *a.* Kapp, 1 E. D. Smith 622, - - - -	215,	4,	1852.
Bartle *a.* Cochran, 3 S. W. Rep'r 854, - - - -	48,	3, *b*,	1887.

Table of Cases.

Barton *a.* Conklin, 43 Barb. 435,	69,	4,	1864.
Barton *v.* Hanson, 2 Camp. 97; 2 Taunt. 49,	62,	*e*,	1809.
Bast's Appeal, 20 Sm. 301,	151,	5,	1872.
Bateman *a.* Brock, 25 O. St. 609,	102, 105,	4, 3,	1874.
Bates *v.* James, 3 Duer 45,	167,	5, *b*,	1854.
Bates *a.* Radenhust, 11 Moore 421, 3 Bing. 463,	76.	6,	
Battin *a.* Jones, 6 Cas. 84,	135,	5, *a*,	1857.
Bauer *a.* Stumph, 76 Ind. 157,	27,	1,	1881.
Baurichter *a.* Christman, 10 Phila. 115,	35,	4,	1874.
Bayard *a.* Gratz, 11 S. & R. 41,	72,	1,	1824.
Beach *v.* Hayward, 10 Ohio 455,	76,	11,	1841.
Beach *a.* Hill, 1 Beas. 31,	165, 208,	1, 2,	1858.
Beall *a.* Adams, 8 A. Rep'r 664,	137,	5,	1887.
Bean *a.* Amsinck, 22 Wallace 395,	106, 106, 107,	2, *b*, 9, *d*, 2,	1874.
Bean *a.* Walker, 34 Minn. 437,	120,	*b*,	1886.
Beasley *a.* Green, 2 Bing., N. C., 108,	62,	*g*,	1835.
Beaston *a.* Yorkshire Bk'g Co. L. R. 4 C. P. D. 204, " 5 " 109	76,	19,	1880.
Beatson *v.* Harris, 19 Cent. L. I. 275, 60 N. H. 83,	117,	2,	1884.
Beck *a.* Mair, 4 E. Rep'r 855,	120,	2,	1886.
Becker *v.* Boon, 61 N. Y. 317,	120,	*b*,	1874.
Beckett *v.* Ramsdale, 31 Ch. D. 177,	88,	8,	1855.
Beecher *a.* Gates, 60 N. Y. 518,	178,	5,	1875.
Belcher *a.* Guild, 119 Mass. 257,	167,	5, *c*,	1876.
Belknap *v.* Abbott, 11 O. St. 411,	106, 194,	3, 2,	1882.
Bell *v.* Newman, 5 S. & R. 78,	105, 108, 195,	1, 7, 4,	1819.
Bendell *v.* Hettrick, 3 I. & Sp. 405,	69,	21,	1873.
Benjamin *v.* Porteus, 2 H. Bl. 590,	63,	2,	1796.
Benners *v.* Harrison, 19 Barb. 53,	8,	1,	1854.
Bennett *v.* Buchan, 61 N. Y. 225,	129,	4,	1874.
Bennett *a.* Hoyt, 59 N. Y. 538,	86,	3,	1872.
Benson *v.* Tilton, 58 N. H. 137,	215,	3,	1877.
Bentley *v.* Craven, 18 Beavan 75,	151,	3,	1853.
Bentley's Estate, 16 Phila. 263,	216,	1,	1883.
Bently *a.* Reade, 4 K. & J. 657,	48,	3, *b*,	1858.
Bernheim *a.* Johnston, 86 N. Car. 339,	115, 134, 152,	3, 4, 1,	1882.
Berry *v.* Kelley, 4 Rob. 106,	194,	2,	1866.
Bettner *a.* Cotter. 1 Bosw. 490,	15,	5,	1857.
Betts *v.* June, 51 N. Y, 274,	184,	2,	1873.
Betz *a.* Azel, 2 E. D. Smith 188,	17,	3,	1853.
Bibb Furnace Co. *a.* Fanchon, 2 S. Rep'r 268,	120,	*b*,	1887.
Bidwell *a.* Irwin, 22 Sm., Pa., 244,	18,	4,	1872.
Billings *a.* Bowen, 13 Neb. 439,	112,	6,	1882.
Billings *v.* Meigs, 53 Barb. 272,	130,	7,	1869.
Binney *v.* Mutrie, 12 Appeal Cases 186,	31,	2,	1886.
Birdsall *v.* Cole, 2 Stock. Ch. 63,	101, 180,	1, 2,	1854.

TABLE OF CASES.

Bishop *v.* Countess of Jersey, 2 Drewry 143,	140, 2,	1854.
Bishop *a.* Dodd, 50 La. An. 1178,	69, 2,	1878.
Bishop *a.* Ettenborough, 11 C. E. Gr. 262,	112, 10,	1875.
Bishop *a.* Speer, 24 O. St. 598,	70, 2,	1874.
Bissell *a.* Bank, 1st Nat., 2 McCrary 73,	15. 4,	1885.
Bissell *v.* Foss, 114 U. S. 252,	15, 4,	1885.
Bitter *v.* Rathman, 61 N. Y. 512,	69, 19, 106, 4, *a*, 138, 1,	1875.
Bitzer *v.* Shunk, 1 W. & S. 340,	95, *c*. 122, 2,	1841.
Bixby *a.* R. R. Co., 55 Vt. 235,	104, 3,	1882.
Black *a.* Pruyn, 21 N. Y. 300,	94, *c*,	1860.
Black *v.* Seipt, 7 W. N. 565, 34 L. I. 66,	9, 1,	1879.
Black *a.* Smith, 9 S. R. 142,	84, 1,	1822.
Black's Appeal, 8 Norris 201,	9, 1, 11, 1, 112, 5,	1879.
Blackwell *v.* Rankin, 3 Hal. Ch. 152,	106, 5, *e*, 192, 2,	1848.
Blair *v.* Bromley, 2 Phil. Ch. 354,	140, 3,	1847.
Blair *v.* Snover, 5 Hal. 153,	178, 5,	1828.
Blair *v.* Wood, 12 Out. 278,	96, 1,	1885.
Blaker *v.* Sands, 29 Kan. 551,	14, 1,	1883.
Blanchard *a.* Hesketh, 4 East. 144,	48, 3,	1803.
Blanchard *a.* Pattison, 5 N. Y. 186,	62, *e*,	1851.
Blanchard *a.* Livingston, 130 Mass. 341,	31, 7,	1881.
Blanford *a.* Willett, 1 Hare 253,	43, 1, *b*,	1842.
Blight *v.* Ewing, 1 Pittsburg 275,	59, *b*,	1856.
Blodgett *v.* Am. Nat. Bank, 49 Conn. 9,	74, 1,	1881.
Blodgett *v.* Weed, 119 Mass. 215,	124, 2,	1875.
Bloss *a.* North, 30 N. Y. 374,	76, 12,	1864.
Bloxam *v.* Pell, 2 Wm. Bl. 999,	66, 2,	1775.
Boardman *a.* Farnsworth, 131 Mass. 115,	37, 3, *g*,	1881.
Body *a.* Owen, 5 A. & E. 28,	59, *o*,	1836.
Boeklen *v.* Hardenburgh, 5 J. & Sp. 110,	67, 6,	1874.
Bogue *a.* Deal, 8 Harris 228,	100, 4,	1853.
Bogert *a.* Murray, 14 Johns. 318,	171, 2, 206, 2,	1817.
Boggs *a.* Sheppard, 9 Neb. 257,	209, 2,	1879.
Bogue *v.* Steel, 1 Ph. Rep. 90,	104, 10,	1850.
Bogue's Appeal, 2 Norris 101,	106, 8, *e*,	1876.
Bohrer *v.* Drake, 33 Minn. 408,	52, 1,	1881.
Bond *v.* Gibson, 1 Camp. 185,	115, 1,	1808.
Bond, ex p., 1 Atk. 98,	195, 3,	1745.
Bond *v.* Pittard, 3 M. & W. 357,	48, 3, *b*.	1838.
Boon *a.* Beecher, 61 N. Y. 317,	120, *b*,	1874.
Borden a. Fall River Whaling Co., 10 Cush. 438,	10, 10,	1852.
Boston & Col. Smelting Co. *v.* Smith, 13 R. I. 27,	64, 2,	1883.
Bostwick *a.* Campion, 18 Wend. 182,	62, *f*,	1837.
Boswell *a.* Dry, 1 Camp. 329,	44, 3, 62, *a*	1818.
Boswell *v.* Green, 1 Dutch. 391,	133, 6,	1856.
Bourne *v.* Freeth, 9 B. & C. 632,	23, 4,	1829.
Bourret *a.* Byers, 64 Cal. 73,	76, 17,	1883.
Bowen *v.* Billings, 13 Neb. 439,	112, 6,	1882.

TABLE OF CASES.

Bowman *v.* Bank (Cecil), 3 Gr. 33, - - - - -	127,	2, *b*,	1859.
Bowman *v.* Kistler, 9 Casey 106, - - - - -	79,	1,	1859.
	90,	1,	
	111,	2,	
Bowman *v.* Spalding, 2 S. W. Rep'r 911, - - - -	145,	1,	1887.
Boyden *v.* Boyden, 9 Met. 519, - - - - - -	136,	2,	1845.
Boyer *a.* Fichthorn, 5 Watts 159, - - - - -	135,	6.	1836.
Brackenridge *a.* Baldy, 2 S. Rep'r 410, - - - -	140,	3,	1887.
Bradbury *v.* Dickens, 27 Beav. 53, - - - - -	209,	3,	1859.
Bradner *a.* Strang, 114 U. S. 555, - - - - -	141,	2,	1884.
Braswell *a.* Judge, 13 Bush. 67, - - - - - -	15,	4,	1887.
Brasfield *v.* French, 59 Miss. 632, - - - - -	74,	4,	1882.
Brenton *v.* Thompson, 20 L. I. 133, - - - - -	102,	*a*	1863.
	106,	5, *a*	
Brewer *a.* Dyke, 2 Car. & K. 828, - - - - -	144,	5,	1849.
Brewer *v.* Norcross, 2 C. E. Gr. 219, - - - -	214,	2,	1865.
Brewster *a.* Patterson, 4 Ed. Ch. 352, - - - -	8,	1,	1844.
Brewster *v.* Sterrett, 8 Casey 115, - - - - -	88,	2,	1858.
	106,	7, *a*	
Brick *a.* Young, Pen. 663, - - - - - - - -	153,	3,	1810.
Briggs *v.* Briggs, 15 N. Y. 471, - - - - - - -	146,	1,	1857.
Briggs, ex p., 3 Dea. & Ch. 367 - - - - - - -	48,	2,	1833.
Briggs *a.* Ulman, 32 La. An. 657, - - - - -	37,	3, *h*,	1880.
Briggs *v.* Vanderbilt, 19 Barb. 222, - - - - -	62,	*e*,	1855.
Brigham *a.* Miller, 50 Cal. 615, - - - - - - -	103,	5,	1875.
	104,	8,	
Brights *a.* McKinney, 4 Har. 399, - - - - -	168,	3,	1851.
Brine *a.* Moley, 120 Mass. 324, - - - - - -	31,	6,	1876.
Brink *a.* Greenwood, 1 Hun 227, - - - - -	59,	3,	1874.
Bristow *a.* Staats, 73 N. Y. 264, - - - - - -	103,	3,	1878.
Brock *v.* Bateman, 25 O. St. 609, - - - - -	102,	4,	1874.
	105,	3,	
Brocklebank *a.* Stocker, 15 Jur. 591; 3 M. & G. 250, -	59,	8,	1851.
	60,	1,	
Brockway *v.* Burnap, 16 Barb. 309, - - - - -	60,	1,	1853.
Brodhead *a.* Greenwood, 6 Barb. 593, - - - -	106,	5, *c*,	1850.
Brodie *a.* Howell, 6 Bing. N. C. 44, - - - - -	18,	4,	1839.
Brokam *a.* Runyan, 1 Hal. Ch. 340, - - - - -	215,	3,	1846.
Bromley *a.* Blair, 2 Phil. Ch. 354, - - - - -	140,	3,	1847.
Brooks *a.* Gregory, 1 Hun. 404, - - - - - -	12,	1,	1874.
Brooks *v.* Martin, 2 Wall. 70, - - - - - - -	211,	3,	1874.
Brophy *v.* Holmes, 2 Molloy, Ir. Ch. 1, - - - -	48,	3, *a*,	1828.
Brotzman *a.* Newcomet, 19 Sm. 185, - - - - -	177,	1,	1871.
Brown *v.* Clark, 2 Har. 469, - - - - - - -	178,	2,	1850.
Brown *a.* Dutton, 31 Mich. 182, - - - - - -	136,	4, *b*,	1875.
Brown *v.* Hicks, 24 Fed. Rep'r 811, - - - - -	59,	*e*,	1885.
Brown *v.* Jaquette, 13 Norris 113, - - - - -	12,	1,	1880
Brown *v.* Tapscot, 6 M. & W. 119, - - - - -	134,	2.	1840.
Brown *a.* Thomas, 10 Atl. Rep'r 713, - - - - -	173,	12,	1887.
Brown *v.* Thompson, Coxe, 2, - - - - - - -	130,	7, *a*,	1790.
Browning *a.* Uhler, 4 Dutch, 288, - - - - -	125,	2,	1869.
Brown's Appeal, 8 Nor. 139, - - - - - - -	216,	1,	1879.
Brundred *v.* Muzzey, 1 Dutch. 268, - - - - -	59,	*l*, *p*,	1855.
Brush *a.* Levy, 45 N. Y. 589, - - - - - - -	10,	3,	1871.
Brush *a.* Wood, 13 Pac. Rep'r 627, - - - - -	156,	2,	1887.
Bryan *v.* Tooke, 60 Geo. 437, - - - - - - -	125,	5,	1878.
Bryant *v.* Wardell, 2 Exch. 479, - - - - - -	161,	4,	1848.

Table of Cases.

Bryant *a.* Grant, 101 Mass. 567	35, 207,	2, 5,	1869.
Buchan *a.* Bennett, 61 N. Y. 225,	129,	4,	1874.
Buchan *v.* Sumner, 2 Barb. Ch. 165,	110,	4,	1847.
Buchanan *v.* Cheeseborough, 2 Duer. 238,	210,	2,	1856.
Buckham, in re., 10 Nat. Bankruptcy Rep'r 206,	164,	1,	1874.
Buckingham *v.* Ludlam, 2 Stew. 345 E. A.,	165, 208,	3, 4,	1878.
Buckley *v.* Buckley, 11 Barb. 43,	109, 112,	2, 17,	1850.
Budd *a.* Wilkins, 1 Hal. 153,	85,	3,	1822.
Buffalo City Bank *v.* Howard, 35 N. Y. 500	69. 106, 200,	19, 4, *b*, 1,	1866.
Buisson *a.* Jacquin, 11 How. Pr. 385,	75,	3,	1855.
Bulkley *v.* Dingman, 11 Barb. 289,	70,	2,	1851.
Bullen *v.* Sharp, L. R. 1 C. P. 86,	64,	*f*,	1866.
Bullitt *v.* Church (M. E.), 2 Cas. 108,	106,	9, *c*,	1856.
Bunning, *a.* Flocton, L. R. 8 Ch. Ap. 323, n.	42,	2,	1864.
Burckle *v.* Eckhardt. 3 Comst. 132; s. c. 1 Denio 337,	53, 59,	1, *a*,	1849.
Burdick *v.* Garrick, L. R. 5 Ch. App. 233,	43,	1, *c*,	1870.
Burgan *v.* Cahoon, 1 Pennyp. 320,	69,	17,	1881.
Burge *a.* Heyhoe, 9 C. B. 431,	58,	*g*,	1850.
Burke *a.* Tomlinson, 5 Hal. 295,	76,	2,	1829.
Burkhardt *v.* Burkhardt, 42 Ohio 474,	209,	1, *b*,	1885.
Burnap *a.* Brockway, 16 Barb. 309,	60,	1,	1853.
Burnell *v.* Hunt, 5 Jur. 650,	18,	1,	1841.
Burnett *v.* Snyder, 81 N. Y. 550,	68,	2,	1880.
Burnham *a.* Smith, 3 Sumner, 435,	10,	10,	1838.
Burns v. Hall, Pen. 984,	76,	2,	1812.
Burns *v.* Rowland, 40 Barb. 368	69,	18,	1863.
Burrell *v.* Mandeville, 2 How. 560,	74,	4,	1844.
Burrough's Appeal, 2 Cas. 264,	76,	21,	1856.
Burrows *a.* Baldwin, 47 N. Y. 199,	23,	1,	1872.
Burt *a.* Duryea, 28 Cal. 569,	15,	2,	1865.
Burt *a.* Traphagen, 67 N. N. 30,	10,	4.	1876.
Burton, *a.* Patterson, Pen. 717,	155,	1,	1810.
Burton *v.* Wookey, 6 Mad. Ch. 367,	151,	3,	1822.
Bush *v.* Bush, 33 Kan. 556,	40,	4,	1885.
Bush *v.* Crawford, 29 Leg. Int. 363,	125,	3,	1872.
Bushell *a.* Edmunds, L. R. 1 Q. B. 96,	26,	1,	1865.
Butler *a.* Johnson, 4 Stew. 35,	206,	1,	1879.
Butler *a.* Jones, 87 N. Y. 613,	32,	3,	1882.
Butterfield *a.* Harris, 33 L. J. 639,	17,	2,	1876.
Butterfield *v.* Lathrop, 21 Sm. 225,	67,	10,	1872.
Butterworth *a.* Haldane, 5 Bosw. 1,	69,	15,	1859.
Buzzard *v.* Bank of Greenville, 2 S. W. Rep'r 54,	44,	4,	1886.
Byers *v.* Bourret, 64 Cal. 73,	76,	17,	1883.
Byers *a.* Carson, 21 Rep'r 232,	195,	1,	1885.
B. & M. R. R. *v.* Dick, 7 Neb. 242,	76,	1,	1878.
B. & Me. R. R. *a.* Aigen, 132 Mass. 423,	62,	*e*,	1882.
Cadet *a.* Levy, 17 S. & R. 126,	178,	6,	1827.
Cady *v.* Smith, 12 Neb. 628,	76,	1,	1882.

Cahoon *a.* Burgan, 1 Pennyp. 320,	69,	17,	1881.
Caldicott *v.* Griffiths, 8 Exch. 898,	16,	2,	1853.
Caldwell *a.* Gram, 5 Cow. 489,	186, 187,	1, 2,	1826.
Caldwell *v.* Stileman, 1 Rawle 212,	175,	1,	1829.
Calkins *v.* Smith, 46 N. Y. 614,	167,	1, *a*,	1872.
Calkett *v.* Thomas, 1 Phila. 463,	113,	5,	1853.
Cameron *v.* Francisco, 26 O. St. 190,	210,	4, *a*,	1875.
Cameron *a.* Tustin, 5 Wh. 379,	130,	10,	1840.
Cammack *v.* Johnson, 1 Gr. Ch. 83,	76,	23,	1839.
Campbell *v.* Campbell, 3 Stew. 415,	112,	14,	1879.
Campbell *v.* Steele, 1 Jones 394,	84,	3,	1849.
Campbell *a.* Sullivan, 2 Hall 271,	134,	1,	1829.
Campbell *a.* Tomson, 5 W. & S. 16.	36,	5,	1831.
Canfield *a.* Parker, 37 Conn. 251,	60,	2,	1870.
Carnley *a.* Kemp, 3 Duer 1,	131.	2,	1853.
Carlisle *v.* Fenbrook, 57 Ind. 529,	32,	2,	1877.
Carvick *v.* Vickery, Douglas 653,	6,	1,	1781.
Carriere *a.* Tua, 117 U. S. R. 201,	175,	3,	1886.
Carson *v.* Byers, 21 Rep'r 232	195,	1,	1885.
Carter *v.* Lipsey, 70 Geo. 417,	39,	2,	1883.
Carver *a.* Waugh, 2 H. Bl. 235,	57.	4,	1793.
Cary *a.* Goodbar, 16 Fed. Rep. 316,	106, 107,	1, *b* 4,	1882.
Cary *v.* Williams, 1 Duer 667,	166,	2, *a*,	1853.
Case *a.* Deckard, 5 Watts 22,	131,	2,	1836.
Cassels *v.* Stewart, 6 App. Cases, 64,	172,	1,	1881.
Cassidy *v.* Hall, 97 N. Y. 159,	64,	2,	1884.
Castle *a.* Taylor, 42 Cal. 367,	15,	1,	1871.
Catanach *a.* Stanbridge, 2 Nor. 368,	121,	9,	1877.
Cavett *a.* Lauffer, 6 Nor. 479,	9, 111,	2, 2,	1878.
Chadwick *v.* Felt, 11 Ca. 305,	10,	5,	1860.
Chafee *a.* Slutts, 48 Wis. 617,	81,	1,	1880.
Chaffaix *v.* Lafitte, 20 La. Am. 631,	57, 61,	3, 4,	1878.
Chambefort *v.* Chapman, 19 Q. B. D. 229,	77,	3,	1887.
Chamberlain *v.* Forbes, 3 S. C. 277,	18,	2,	1874.
Chambers *v.* Clearwater, 1 Keyes, 310,	139,	4,	1864.
Champion *v.* Bostwick, { 11 Wend. 571, 18 Wend. 182.	62,	*f*,	1837.
Champion *v.* Flanigan, 1 Gr. Ch. 51,	69,	17,	1838.
Chapin *v.* Clemitson, 1 Barb. 311,	81,	3,	1847.
Chaplain *a.* Renton, 1 Stock. 62,	181,	2,	18[illegible].
Chapman *a.* Chambefort, 19 Q. B. D. 229,	77,	3.	1887.
Chapman *a.* Everitt, 6 Conn. 247,	19,	6,	1827.
Chapman *v.* Thomas, 4 Keyes 210,	200,	2,	1868.
Chaney *a.* Hoxie, 143 Mass. 592,	209,	1, *c*,	1887.
Chase *a.* Silverman, 90 Ill. 37,	88,	3,	1878.
Cheap *v.* Cramond, 4 B. & Al. 663,	57,	4,	1821.
Cheeseborough *a.* Buchanan, 2 Duer 238,	210,	2,	1856.
Cheeseman *v.* Sturges, 6 Bosw. 520,	156, 208,	4, 1,	1860.
Cheney *v.* Newberry, 67 Cal. 126,	76,	17,	1885.
Chester *v.* Dickerson, 54 N. Y. 1,	10,	7,	1873.
Chevelier *a.* Petit, 2 Beas. 181,	173,	7, *a*,	1860.
Chidsey *a.* Siegel, 4 Cas. 279,	106,	9, *a*,	1857.

Table of Cases.

Central Bank of Pittsburg *a.* Fulton, 11 Norris 112,	185,	2,	1879.
Childs *a.* Harvey, 28 O. St. 319,	64,	*e*,	1876.
Childs *a.* Hasbrouck, 3 Bosw. 105,	32,	1,	1858.
Childs *a.* Voorhis, 17 N. Y. 355,	86,	1,	1858.
Chisholm *a.* Laird, 30 Scot. Jur. 584,	39, 42, 42,	1, 1, 4, *a*,	1858.
Christl *a.* Fitzgerald, 5 C. E. Gr. 90,	179,	1,	1869.
Christman *v.* Baurichter, 10 Phila. R. 115,	35,	4,	1874.
Chuck, ex p., 8 Bing. 469,	52, 58,	 3, *b*	1832.
Church (M. E.) *a.* Bullitt, 2 Cas. 108,	106,	9, *c*,	1856.
Church *a.* Tassey, 6 W. & S. 465,	161,	6,	1843.
City of Brooklyn *v.* Dearborn, 20 N. Y. 244,	69,	7,	1859.
City of Brooklyn *v.* McChesney, 20 N. Y. 240,	177,	3,	1859.
Clark *a.* Brown, 2 Har. 469,	178,	2,	1850.
Clark *v.* Cullen, 9 Q. B. D. 355,	77,	*e*,	1882.
Clark *v.* Cushing, 52 Cal. 617,	104,	9,	1878.
Clark *a.* Eastman, 53 N. H. 292,	44,	1,	
Clark *a.* Eastman, 53 N. H. 296,	54,	3.4,	
Clark *a.* Eastman, 53 N. H. 295,	55,	2,	1872.
Clark *a.* Eastman, 53 N. H. 341,	58,	2,3,	
Clark *a.* Eastman, 53 N. H. 267,	62,	1,	
Clark *a.* Jones, 42 Cal. 180,	15,	1,	1871.
Clark *a.* Woodward, 30 Kan. 76,	44,	3,	1883.
Clarke *v.* Mills, 13 P. Rep'r 569,	158,	4,	1887.
Clarke *a.* Rawlinson, 15 M. & W. 292,	59,	*h*,	1846.
Clark's Appeal, 22 Sm. Pa. 142,	28, 110,	4, 6,	1872.
Clark's Appeal, 11 Out. 436,	147,	1,	1884.
Clay *v.* Cottrell, 6 Har. 408,	128,	2,	1852.
Clearwater *a.* Chambers, 1 Keyes, 310,	139,	4,	1864.
Cleather *v.* Twisden, 28 Ch. D. 340,	140,	1,	1884.
Clement *v.* Clement, 35 N. W. 17,	175,	2,	1887.
Clements *a.* Wharton, 3 Del. Ch. 209,	40,	4,	1868.
Clemitson *a.* Chapin, 1 Barb. 311,	81,	3,	1847.
Cleveland *a.* McGregor, 5 Wend. 475,	44, 76,	6, 24,	1830.
Cleveland *a.* Reynolds, 4 Cow. 282,	11,	2,	1825.
Cleveland *a.* Society Perun, 43 O. St. 481,	24,	3,	1885.
Clifton *a.* Fox, 6 Bing. 776,	23,	2,	1830.
Cobb *a.* Wilson, 2 Stew. 361, E. & A.,	54,	1,	1878.
Cobeau *a.* Schriver, 4 Watts, 130,	57,	4,	1835.
Cochran *v.* Arnold, 8 Sm., Pa., 399,	24,	5,	1868.
Cochran *v.* Bartle, 3 S. W. Rep'r 854,	48,	3, *b*,	1887.
Cochran *a.* Finney, 1 W. & S. 112,	87,	1,	1841.
Cockroft *a.* Geery, 1 J. & Sp. 146,	110, 167,	11, 5, *a*,	1871.
Codding, in re., 9 Fed. Rep. 849,	111,	6,	1881.
Coddington *a.* Hampton, 1 Stew. 557	133,	5,	1877.
Coddington *v.* Idell, 3 Stew. 540,	208,	4,	1879.
Coddington *v.* Idell, 2 Stew. 504,	210,	4,	1878.
Coddington *v.* Toppan, 11 C. E. Gr. 141,	101,	1,	1875.
Coe *a.* Everitt, 5 Denio 180,	57, 58,	4, *e*,	1848.
Cohen *v.* N. Y. Mutual Life, 50 N. Y. 611,	16,	2,	1872.
Cohen *a.* Reuben, 48 Cal. 543,	168,	2,	1874.

Coit *a.* Mauney, 86 N. C. 463,	52,			1882.
Cole *a.* Birdsall, 2 Stock. Ch. 63,	101, 180,	1, 2,		1854.
Cole *a.* Pease, 53 Conn. 53,	14,	1,		1885.
Cole *a.* Pope, 55 N. Y. 124,	86,	5,		1873.
Cole *v.* Reynolds, 18 N. Y. 74,	161,	7,		1858.
Coles *v.* Coles, 15 Johns. 159,	13, 109, 112, 158,	2, 5, 2, 2.		1818.
Coles *a.* Newsome, 2 Campb. 617,	176,	2,	*a*,	1811.
Colbeck, in re., Buck 48,	57, 58,	4,	*d*,	1817.
Colgrove *v.* Fallmadge, 6 Bosw. 289,	148,	1,		1860.
Colhoun *v.* Snider, 6 Binn. 135,	109,	7,		1813.
Collender *v.* Phelan, 79 N. Y. 366,	210,	3,		1879.
Collingwood *a.* Lampton, 4 Mod. 315,	103,	8,		1695.
Collins' Appeal, 11 Out. 590,	171, 172,	3, 2,		1885.
Collins *a.* Crawshay, 15 Vesey, 218, 227	43, 99,	 2,	*a*,	1808.
Collins *a.* Whitaker, 34 Minn. 299,	139,	6,		1885.
Colt *a.* Demmy, 3 Sandf. 284,	112, 113,	5,	*h*	1850.
Columb *v.* Read, 24 N. Y. 505,	109,	6,		1862.
Colvin *a.* Reppert, 12 Wr. 248,	178,	1,		1864.
Colwell *a.* Crocker, 46 N. Y. 212,	127,	1.		1871.
Colwell *a.* Farrell, 1 Vr. 123,	100, 104,	8, 10,		1862.
Commercial Bank, Buffalo, *v.* Warren, 15 N. Y. 577,	135,	1,	*a*,	1837.
Commonwealth *a.* Hare, 11 Norris 141,	106,	8,	*f*,	1875.
Commonwealth *v.* Mateer, 16 S. & R. 416	89, 103,	1, 8,		1827.
Commonwealth *v.* Vanderslice, 8 S. & R. 452,	103,	8,		1822.
Commonwealth *a.* Wetherell, 17 W. N. 104,	106,	8,	*d*,	1885.
Conklin *v.* Barton, 43 Barb. 435,	69,	4,		1864.
Conklin *a.* Tremper, 44 N. Y. 61,	100, 103,	5, 2,		1870.
Conn *a.* Gardiner, 34 O. St. 187,	210,	3,		1877.
Connon *v.* Dunlop, 64 Geo. 680,	105,	4,		1880.
Conroy *a.* Hargrove, 4 C. E. Gr. 281,	59,		*a*,	1868.
Consequa *v.* Willing, 1 Peters 301,	85,	2,		1816.
Consolidated Bank *a.* Badeley, 38 Ch. D. 238,	Intro.			1888.
Converse *a.* Whitcomb, 119 Mass 38,	31,	4,		1875.
Cooper *v.* Prichard, 75 L. T. 91,	140,	3,		1883.
Cook *a.* Jessup, 1 Hal. 434,	215,	1,		1798.
Cook *v.* Penrhyn Slate Co., 36 O. St. 135,	176,	2,	*a*,	1880.
Cook *a.* Wrenshall, 7 Watts 464,	130,	6,		1838.
Cookingham *v.* Tasker, 2 Keyes 454,	76,	12,		1866.
Coope *v.* Eyre, 1 H. Bl. 39,	7, 49,	1, 6,		1788.
Cooper *a.* Dixon, 3 Wilson, 40,	63,	2,		1768..
Cooper's Appeal, 2 Casey 262,	106,	8,	*f*,	1856.
Coover's Appeal., 5 Casey 9,	106,	8,		1857.
Corning *a.* Heartt, 3 Paige 566,	215,	1,		1832.
Coryell *a.* Taylor, 12 S. & R. 243,	120,		*a*,	1824.
Corwin *v.* Suydam, 24 O. S. 209,	167,	5,	*e*,	1873.

Cosgrove *a.* Goldsmid, 7 H. L. 785,	205,	6,	1859.
Cothran *v.* Marmaduke, 60 Texas 370,	59,	3,	1883.
Cotter *v.* Bettner, 1 Bosw. 490,	15.	5,	1857.
Cottrell *a.* Clay, 6 Har. 408,	128,	2,	1852.
Coulter *a.* Stewart, 12 S. & R. 252,	130,	7,	1825.
Countess of Jersey *a.* Bishop, 2 Drewry 143,	140,	2,	1854.
Court of Wards *a.* Mollwo, L. R. 4 P. C. 419,	64,	*b*,	1872.
Cowan *v.* Kinney, 33 O. St. 442,	69,	17,	1878.
Cowart *v.* Perrine, 3 C. E. Gr. 457,	213,	1,	1867.
Cox *v.* Hickman, 8 H. L. 268,	59,	*l*,*p*,	1860.
Cox *a.* Keegan, 116 Mass. 289,	137,	2,	1874.
Cox *v.* McBurney, 2 Sandf. 561,	112,	8,	1849.
Cox *a.* Munster, 10 Ap. Cas. 680,	77,	3,	1885.
Cox *v.* Peters, 2 Beas. 39,	180,	1,	1860.
Cragin *a.* Logan, 27 La. An. 352,	79,	*a*,	1875.
Craig *a.* Hulschiser, 5 Vr. 363,	167,	2, *a*,	1871,
Craig *v.* Smith, 15 Pac. Rep'r 337,	95,	1,	1887.
Cramond *v.* Bank of U. S., 1 Binn. 64,	130,	16,	1803.
Cramond *a.* Cheap, 4 B. & Al. 663,	57,	4,	1821.
Crandall v. Denny, Pen. 137,	76.	2,	1806.
Crary *v.* Williams, 2 Ohio 65,	76,	10,	1825.
Craven *a.* Bentley, 18 Beavan 75,	151,	3,	1853.
Crawford *a.* Bush, 29 Leg. Int. 363,	125,	3,	1872.
Crawford *a.* Eager, 76 N. Y. 97,	66,	6,	1879.
Crawford *a.* Tiffany, 1 McCart. Ch. 278,	111,	14,	1826.
Crawshay *v.* Collins, 15 Ves. { 218,	43,	*a*	1808.
227,	99,	2,	
Critchfield *v.* Porter, 3 Ohio 519,	119,	*a*,	1828.
Crites *v.* Wilkinson, 65 Cal. 559,	114,	3,	1884.
Crocker *v.* Colwell, 46 N. Y. 212,	127.	1,	1871.
Crosby *a.* Parsons, 5 Esp. 199,	48,	2,	1805.
Cross *a.* Daniel, 3 Ves. 277,	106,	5, *f*,	1796.
Cross *v.* Jackson, 5 Hill 478,	76,	6,	1843.
Cross *a.* Trowbridge. 117 Ill. 109,	103,	*a*,	1886.
Cubbinson *a.* McCowin, 22 Smith, 358,	{ 178,	4,	1872.
	183,	1,	
Cullen *a.* Clark, 9 Q. B. D. 355,	77,	*e*,	1882.
Culley *v.* Edwards, 44 Ark. 423.	64,	2,	1884.
Cumming's Appeal, 1 Casey, 268,	111,	7,	1855.
Cummings *v.* Mills, 1 Daly 520,	61,	3,	1866.
Cummings *v.* Morris, 25 N. Y. 625,	156,	5,	1862,
Cummings *a.* Peacock, 10 Wr. 434,	152,	2,	1864.
Cummins *a.* Pond, 50 Conn. 372,	59,	*b*,	1882.
Cumpston *v.* McNair, 1 Wend. 457,	{ 7,	4.	1828.
	54,	1,	
Cunningham *v.* Littlefield, 1 Edw. Ch. 104,	158,	3,	1831.
Curry *v.* Fowler, 87, N. Y. 33,	64,	*d*,	1881.
Curry *v.* White, 51 Cal. 185, 1875; 531,	81.	2,	1885.
Curtis *v.* Woodward, 58 Wis. 499,	193,	1,	1883.
Cushing *a.* Clark, 52 Cal. 617,	104,	9,	1878.
Cushing *a.* Nat. Bank, 53 Vt. 321,	197,	1.	1881.
Cushman *v.* Bailey, 1 Hill. 526,	58,	*f*,	1841.
Cutbush *v.* Cutbush, 1 Beav. 185,	74,	7,	1838.
Dakin *a.* Bank, 24 Wend. 411,	{ 44,	5,	1840.
	76,	22,	
Dalton *a.* Romero, 11 Pac. R. 863,	12,	1,	1886.
Daly *a.* Randolph, 1 C. E. Gr. 313,	{ 105,	2,	1863.
	193,	3.	

Table of Cases.

Dana *a.* Schenkle, 118 Mass. 237,	188,	3,		1875.
Dana *v.* Stearns, 3 Cush. 372,	137,	4,		1849.
Daniel *v.* Cross, 3 Ves. 277,	106,	5,	*f*,	1796.
Davenport *a.* Wild, 7 A. R. 295,	73,	1,		1886.
Davidson *v.* Golden State Iron Works, 15 Pac. Rep'r 20,	17,	4,		1887.
Davidson *v.* Holden, 10 At. Rep'r 515,	69,	10,		1887.
Davis, ex parte, 4 DeG., J. & S. 523,	18,	3,		1863.
Davis *v.* Howell, 20 Am. Law Reg'r N. S. 461,	108,	8,		1861.
Davis *v.* Keyes, 38 N. Y. 94,	175,	3,		1868.
Davis *a.* Lindley, 13 P. Rep'r 118,	103,		*c*,	1887.
Davis *a.* Marsh, 33 Rand. 326,	10,	7,		1885.
Davis *a.* Moore, 11 Ch. D. 261,	45,			1879.
Davis *v.* Morris, 36 N. Y. 569,	77,		*e*,	1883.
Davis *v.* Newkirk. 5 Denio 92,	122,	7,		1847.
Davis *a.* Quin, 28 Sm. 15,	4,	2,		1875.
Davis *a.* Salmon, 4 Binn. 375,	117,		*a*,	1812.
Davis *v.* Smith, 2 S. Rep'r 897,	112,	1,		1887.
Dawbarn *a.* Baker, 19 Grant's Ch. (Up. Can.), 113,	192,	3,		1872.
Dawes *a.* Hoare, 1 Doug. 371,	7, 49,	3, 6,		1780.
Day *v.* Stevens, 88 N. C. 79,	12,	1,		1883.
Dayton *v.* Wilkes, 5 Bosw. 655,	147,	2,		1859.
Deal *v.* Bogue, 8 Harris, 228.	100,	4,		1853.
Dean *v.* Harris, 33 L. T. 639, 659,	17,	2,		1875.
Dean *v.* McDowell, 8 Ch. Div. 345,	151,	6,		1877.
Dean *a.* Wild, 3 Allen 579,	170,	4,		1862.
Dearborn *a.* City Bank of Brooklyn, 20 N. Y. 244,	69,	7,		1859.
Deckard *v.* Case, 5 Watts 22,	131,	2,		1836.
Decker *v.* Howell, 42 Cal. 636,	15,	6,		1872.
Deems *a.* Lafond, 81 N. Y. 507,	16,	1,		1880.
Defor *a.* Weber, 8 How. Pr. 502,	173,	2,		1853.
Delaney *v.* Root, 99 Mass. 546,	12,	1,		1868.
Delhasse, ex p., 7 Ch. D. 511,	50,	3,		1878.
Delmonico *v.* Guillaume, 2 Sandf. Ch. 366,	110,	3,		1845.
Demmy *v.* Colt, 3 Sandf. 284,	112, 113,	5, 3,	*h*	1850.
Denithorne *v.* Hook, 2 Am. 240,	69,	3,		1886.
Dennis *v.* Kennedy, 19 Barb. 517,	24,	1,		1854.
Denny a. Crandall, Pen. 137,	76,	2,		1806.
Denton *v.* Noyes, 6 Johns 295,	119,	1,	*c*,	1810.
Deveau *v.* Fowler, 2 Paige. Ch. 400,	106, 148,	7, 2,		1831.
Devoney *v.* Mahoney, 8 C. E. Gr. 247,	28, 110, 111,	3, 9, 15,		1872.
Dexter *a.* Jones, 125 Mass. 469, 1878; 130 Mass. 380,	100,	8,		1881.
Dick *a.* B. & M. R. R., 7 Neb. 242,	76,	1,		1878.
Dickens *a.* Bradbury, 27 Beav. 53,	209,	3,		1859.
Dickerson *a.* Chester, 54 N. Y. 1,	10,	7,		1873.
Dickey *v*, Allen, 1 Gr. Ch. 40,	215,	2,		1838.
Dickinson *v.* Valpy, 10 B. & C. 128,	23,	4,		1829.
Dillon *v.* Horn, 5 How. Pr. 35,	189,	1,		1850.
Dillon *a.* Plunkett, 4 Houston 338,	57,	4,		1875.
Dingman *v.* Amsink, 27 Sm. 114, 118,	88,	5, 6,		1874.
Dingman *a.* Bulkley, 11 Barb. 289,	70	2,		1851.
Ditmars *a.* Large, 12 C. E. Gr. 283,	208,	8,		1876.

Table of Cases.

Dixon *v.* Cooper 3 Wilson 40,	63,	2,	1768.
Dob *v.* Halsey 16 Johns. 34,	51,	2,	1819.
Docker *v.* Somers, 2 Mylne & K. 653,	43,	1,	1834.
Dodd *v.* Bishop, 50 La. An. 1178,	69.	2,	1878.
Dodd *v.* Tarr, 116 Mass. 287,	156,	3,	1874.
Doner *v.* Stauffer, 1 Pa. 203,	102,	1, 2,	1829.
Donnally *v.* Ryan, 5 Wr. 306,	38,	1,	1861.
Doughty *v.* Doughty, 3 Hal. Ch. 227,	180,	3,	1848.
Downey *v.* F. & M. Bank, 13 S. & R. 288,	81,	4,	1825.
Drake *a.* Bohrer, 33 Minn. 408,	52,	1,	1881,
Drake *a.* Holland, 29 Ohio St. 441,	131,	3,	1876.
Drennen *a.* Assurance Co. (London) { 113 U. S. 51, 113 U. S. 461,	23,	3,	1885. 1886.
Drennen *v.* House, 5 Wr. 30,	69, 121,	5, 2,	1861.
Drexel *a.* Sparhawk, 1 W. N. 560,	164,	3,	1875.
Driver *a.* Pooley, 5 Ch. D. 458,	50, 64,	3, 1,	1876.
Dry *v.* Boswell, 1 Campb. 329,	44, 62,	3, *a*,	1818.
Dubois' Appeal, 2 Wr. 231,	117,	1,	1861.
Duckworth *a.* Gouthwaite, 12 East. 421,	19,	5,	1810.
Duff *v.* Maguire, 107 Mass. 87,	161,	5,	1871.
Duncan *a.* Pa R. R. Co., 1 Am. 352,	24,	10,	1886.
Dungan *v.* Miller, 4 C. E. Gr. 219,	130,	7, *b*,	1868.
Dunham *v.* Jarvis, 8 Barb. 88,	67, 152,	2, 2,	1854.
Dunham *v.* Presby, 120 Mass. 285,	211,	2,	1876.
Dunham *v.* Rappleyea, 1 Harr. 75,	157,	3,	1837.
Dunham *v.* Rogers, 1 Barr 255	7, 60,	1, 1,	1845.
Dunlap *v.* Watson, 124 Mass. 305,	188,	1,	1878.
Dunlop *a.* Connon, 64 Geo. 680,	105,	4,	1880.
Durant *v.* Arbendroth, { 69 N. Y. 148, 97 N. Y. 132,	37,	3, *j*,	1877. 1884.
Durbin *v.* Barber, 14 Ohio 311,	112,	4,	1846.
Durborrow *a.* Everly, 8 Ph. 93,	34,	1,	1871.
Durborrow's Appeal, 3 Nor. 404,	100,	*c*,	1877.
Duryea *v.* Burt, 28 Cal. 569,	15,	2.	1865.
Dutton *v.* Brown, 31 Mich. 182,	136.	4, *b*,	1875.
Dwinell *a.* Sanborn, 135 Mass. 236,	205,	4,	1883.
Dyke *v.* Brewer, 2 Car. & K. 828,	144,	5,	1849.
Eager *v.* Crawford, 76 N. Y. 97,	66,	6,	1879.
Earon *v.* Mackey, 10 Out. 452,	68,	3,	1884.
Eastman *v.* Clark, 53 N. H. { 292,	44,	1,	1872.
296,	54,	3, 4,	
295,	55,	2,	
341,	58,	2, 3,	
297,	62,	1,	
Eaton *a.* Robson, 1 T. R. 62,	119,	1,	.
Eaton's Appeal, 16 Smith 483,	207,	1,	1870.
Eberhardt *a.* Roberts, 1 Kay 148,	15,	3,	1853.
Ebbert's Appeal, 20 Sm. 79,	113,	*g*,	1871.
Eckhardt *a.* Burckle, 3 Comst. 132; s. c. 1 Denio 337,	53, 59,	1, *a*	1849.

TABLE OF CASES.

Edmanson v. Thompson, 8 Jurist, N. S. 235, - -	17,	2,		1861.
Edmonds, ex parte, 4 D. F. & J., 488, - - - -	204,	2,		1862.
Edmunds *v.* Bushell, L. R. 1 Q. B. 96, - - - -	26,	1,		1865.
Edmunds, ex parte, 11 D. F. & J. 488, - - - -	75,	1,		1862.
Edsun *a.* Smarte, 1 Lev. 30, - - - - - - -	130,	7,		1651.
Edwards a. Bailey, 116 Engl. C. L. Rep. 775, - -	90,	3,		1866.
Edwards *a.* Culley, 44 Ark. 423, - - - - -	64	2,		1884.
Edwards *v.* Tracy, 12 Sm. 374, - - - - - -	67,	12,		1869.
Edwards *v.* Remington, 51 Wis. 336, - - - -	96,	2,		1881.
Egberts *v.* Wood, 3 Paige Ch. 517, - - - - -	106,	6,		1832.
Eldred *a.* Mason, 6 Wall. 231, - - - - - -	82,	3,		1879.
Eldred *a.* Roberts, 15 P. Rep'r 16, - - - - -	112,	7,		1887.
Eldridge *v.* Smith, 144 Mass. 35, - - - - -	130,	15,		1887.
Eldridge *v.* Froost, 6 Rob. 518, - - - - - -	67,	5,		1866.
Elgie *v.* Webster, 5 M. & W. 518, - - - - -	48,	2,		1839.
Elgin Watch Co. *v.* Meyer, 30 Fed. Rep'r 659, - -	131,	1,		1887.
Eliot *a.* Hoskinson, 12 Sm. 393, - - - - -	86,	1.		1869.
Elliott *a.* Prentice, 72 Geo. 154, - - - - - -	213,	2,		1883.
Ellis *v.* Allen, 2 S. Rep'r 676, - - - - - -	114,	2,		1887.
Ellis *v.* Ward, 21 W. R. 100, - - - - - -	22,	1,		1872.
Ellis *a.* Wells, 68 Cal. 243, - - - - - -	132,	2,	*a*,	1885.
Elston *a.* Murray, { 8 C. E. Gr. 127, 1872; 9 C. E. Gr. 310, E. & A. 589, - - - -	212, 215,	8, 3,		1873.
Elton *v.* Perkenpine, 1 E. Rep'r 637, - - - -	150,	2,		1855.
Elworthy *a.* Teed, 14 East. 210, - - - - - -	76,	8,		1811.
Emory *a.* Van Ransselaer, 9 How. Pr. 135, - -	{ 101, 181,	1, 1,		1854.
Emory *v.* Wilson, 79 N. Y. 78, - - - - - -	214,	2,		1879.
Enderby *a.* Gilpin, 5 B. & Ald. 955, - - - - -	208,	3,		1822.
Englis *v.* Furnis, 4 E. D. Smith 587, - - - - -	163,	1,		1855.
English *a.* Hotchkiss, 4 Hun. 369, - - - - -	17,	4,		1875.
Engl. & Ir. Ch. & Univ. Ass. Soc., in re., 1 Hem. & M. 85,	59,		*a*,	1863.
Ensign *v.* Wands, 1 Johns Cas. 171, - - - - -	7,	6,		1799.
Epping *a.* Flournoy, 68 Geo. 707, - - - - -	69,	17,		1882.
Epstein *a.* Fedor, 10 Pac. Rep'r 785, - - - - -	76,	1,		1886.
Erb's Estate, 1 Pearson, 98, - - - - - -	113,	2,		1856.
Erhard *a.* Zimmerman, 83 N. Y. 94, - - - - -	76,	15,		1880.
Erie Dime Sav. & L. Co. *a.* Kepler, 5 Out. 602, -	111,	3,		1882.
Erie R. R. *a.* Wood, 72 N. Y. 196, - - - - -	76,	16,		1878.
Erikson *a.* Hunt, 57 Mich. 330, - - - - -	51,	1,		1885.
Erwin's Appeal, 3 Wr. 535, - - - - - -	111,	9,		1861.
Ettenborough *v.* Bishop, 11 C. E. Gr. 262, - - -	112,	10,		1875.
Eureka Mnfg. Co. *a.* Flint, 55 Vt. 669, - - - -	62,	1.		1881.
Evans *a.* Johnson, 7 M. & G. 240, - - - - -	100,	1,		1844.
Evans *v.* Meylert, 7 Harris 402, - - - - -	119,		*b*,	1862.
Everett *v.* Coe, 5 Denio 180, - - - - - - -	{ 57, 58,	4,	*e*,	1848.
Everhart's Appeal, 10 Out. 349, - - - - - -	10,	11,		1884.
Everitt *v.* Chapman, 6 Conn. 247, - - - - -	19,	6,		1827.
Everitt *v.* Watts, 10 Paige 82, - - - - - - -	{ 69, 138,	20, 5,		1843.
Everly *v.* Durborrow, 8 Phila. 93, - - - - -	34,	1,		1871.
Ewing *a.* Blight, 1 Pittsburgh, 275, - - - - -	59,		*b*,	1856.
Eyre *a.* Coope, 1 H. Bl. 39, - - - - - - -	{ 7, 49,	1, 6,		1788.
Eyton *a.* Pott, 3 C. B. 32, - - - - - - - -	63,	1,		1846.

Fairchild *a.* Slocum, 7 Hill 292,	62,	*f*,	1843.
Fairchild *v.* Fairchild, 64 N. Y. 471,	13, 112,	3, 4,	1878.
Fairlanb *v.* Percy, 3 P. & M. 217,	74,	11,	1875.
Fairman *a.* Wallace, 4 Watts 378,	95, 149,	3, 2,	1835.
Falconer *a.* Freeman, 12 J. & S. { 132, 579,	69,	18,	1878. 1879.
Fallmadge *a.* Colgrove. 6 Bosw. 289,	148,	1,	1860.
Fall River Whaling Co. v. Borden, 10 Cush. 458.	10,	10,	1852.
Fanchon *v.* Bibb Furnace Co., 2 S. Rep'r 268,	120,	*b*,	1887.
Farmers' and Mchs. Bank *a.* Downey, 13 S. & R. 288,	81,	4,	1825.
Farmers' and Mchs. Bank *v.* Green, 1 Vr. 366,	177,	5,	1863.
Farmers' Dep. Bk. *a.* 1st Nat. Bk., All'y, 5 Cent. Rep. 505,	74,	5,	1886.
Farnsworth *v.* Boardman, 131 Mass. 115,	37,	3, *g*,	1881.
Farr *v.* Johnson, 25 Ill. 522,	36,	6,	1861.
Farr *a.* Osburn, 42 Mich. 134,	76,	8,	1879.
Farrand *v.* Gleason, 56 Vt. 633,	13,	1,	1884.
Farrell *v.* Colwell, 1 Vr. 123,	100, 104,	8, 10,	1862.
Farrington *a.* Harrison. { 15 Stew. 353, 10 A. Rep'r 105,	151,	1,	1885. 1887.
Fedor *v.* Epstein, 10 Pac. R. 785,	76,	1,	1886.
Feigley *v.* Sponeberger, 5 W. & S. 564,	152,	1,	1843.
Felt *a.* Chadwick, 11 Ca. 305.	10,	5,	1860.
Felton *a.* Smith, 43 N. Y. 418,	130,	5, *b*,	1870.
Fenbrook *a.* Carlisle, 57 Ind. 529,	32,	2,	1877.
Fendrick *a.* Kaiser, 2 Out. 528,	129,	1,	1881.
Ferguson *v.* Wright, 11 Sm. 258,	153,	1,	1869.
Ferrell *a.* Orr, 5 S. W. Rep'r 490,	132,	1,	1887.
Ferson *v.* Monroe, { 1 Foster, 21 N. H. 462,	106, 107, 194,	1, *c*, 4, 3,	1850.
Fessler's Appeal, 3 W. N. C. 71,	154,	1,	1876.
Fettretch *v.* Armstrong, 5 Rob. 339,	178,	5,	1868.
Ficthorn *v.* Boyer, 5 Watts 159,	135,	6,	1836.
Fielden *v.* Lahens, 9 Bosw. 436,	125,	1,	1862.
Filley *v.* Phelps, 18 Conn. 294,	147,	3,	1847.
Filts *a.* Walker, 24 Pick. 191,	12,	1,	1837.
Finney *v.* Cochran, 1 W. & S. 112,	87,	1,	1841.
Fish *v.* Henarie, 13 Pac. Rep'r 193,	91,	2,	1886.
Fisher *a.* Kauffman, 3 Grant 302,	122,	6,	1860.
Fisher *v.* Murray, 1 E. D. Smith, 341,	131,	3,	1850.
Fisher *a.* Perkins, 80 Ky. 11,	164,	1,	1882.
Fisher *v.* Sweet, 67 Cal. 228,	12,	2,	1885.
Fitcher *a.* Wilson, 3 Stock Ch. 71,	173,	7, *b*,	1855.
Fitzgerald *v.* Christl, 5 C. E. Gr. 90,	179,	1,	1869.
Fitzsimmons *a.* Anshutz, 9 Barr. 180,	169,	3,	1848.
Flanigan *v.* Champion, 1 Gr. Ch. 51,	69,	17,	1838.
Fletcher *v.* Reed, 125 Mass. 312,	184,	3,	1881.
Flint *v.* Eureka Mfg. Co., 55 Vt. 669,	62,	1,	1881.
Flockton, *v.* Bunning, L. R. 8 Ch. App. 323, n.	42,	2,	1864.
Floss *a.* Fireman's Ins. Co., 10 A. Rep'r 139,	144,	4,	1887.
Flournoy *v.* Epping, 68 Geo. 707,	69,	17,	1882.
Fogerty *v.* Jordan, 2 Rob. 319,	121,	4,	1864.
Foote *a.* Tenny, 95 Ill. 99,	139.	3,	1880.
Forbes *a.* Chamberlain, 3 S. C. 277,	18,	2,	1874.

Table of Cases.

Ford *v.* Munson, 1 South. 93,	76,	5,	1818.
Forrester *a.* Oliver, 96 Ill. 315,	173,	1,	1880.
Foss *a*, Bissell, 114 U. S. 252,	15,	4,	1885.
Foster *v.* Andrews, 2 P. & W. 160,	168,	1,	1830.
Foster *v.* Barnes, 31 Sm. 377,	113,	1, *f*,	1876.
Foster *a.* Vyse, L. R. 7 Ch. 334,	40,	1,	1872.
Foster *a.* Vyse, L. R. 8 Ch. App. 309,	42,	3,	1870.
Foster *a.* Vyse, L. R. 7 H. of L. 318, 333,	42,	2,	1874.
Foster's Appeal, 24 Sm. 399,	109,	9,	1874.
	112,	15, *a*,	
	113,	1, *e*,	
Fowle *v.* Torrey, 125 Mass. 289,	170,	4,	1881.
Fowler *a.* Curry, 87 N. Y. 33,	64,	*d*,	1881.
Fowler *a.* Deveau, 2 Paige Ch. 400,	106;	7,	1831.
	148,	2,	
Fowler *a.* Schaeffer, 1 Am. 451,	49,	1,	1886.
Fox *v.* Clifton, 6 Bing. 776,	23,	2,	1830.
Fox *v.* Hanbury, Cowp. 445,	27,	5,	1776.
Fox *a.* Harper, 7 W. & S. 142,	122,	1,	1844.
Foxall *a.* Jones, 15 Beav. 388,	42,	3,	1852.
Francisco *v.* Cameron, 26 O. St. 190,	210,	4, *a*,	1875.
Frasier *a.* Wilkinson, 4 Esp. 182,	62,	*d*,	1805.
Frazer *v.* Murdock, 6 H. L. 855,	74,	8,	1881.
Freeman *v.* Falconer, 12 J. & S. 132,	69,	18,	1878.
Freeman *v.* Falconer, 12 J. & S. 579,			1879.
Freer *a.* Payne, 91 N. Y. 43,	165,	2,	1883.
Freeth *a.* Bourne, 9 B. & C. 632.	23,	4,	1829.
Frelinghuysen *v.* Ballentine, 38 N. J. Eq. 266,	28,	3,	1864.
French *a.* Brasfield, 59 Miss. 632,	74,	4,	1882.
French *v.* Styring, 2 C. B., N. S. 357,	67,	7,	1857.
Frick *a.* Sayre, 7 W. & S. 383,	6,	2,	1844.
Frick *a.* Steel, 6 Sm. 172,	12,	1,	1867.
Fricke *a.* Ganzer, 7 Sm. 316,	69,	5,	1868.
Frier *a.* Young, 1 Stock. 465,	106,	5, *c*,	1853.
Froost *a.* Eldridge, 6. Rob. 518,	67,	5,	1866.
Frost *v.* Hanford, 1 E. D. Sm. 540,	134,	2,	1852.
Froude *v.* Williams, 56 L. T. Rep., N. S. 441,	50,	3,	1887.
Frow, Jacobs & Co.'s Estate, 23 Sm. 459,	107,	3,	1873.
Frye *a.* Page, 2 B. & P. 240,	103,	11,	1800.
Fuller *v.* Perceval, 126 Mass. 381,	125,	6,	1879.
Fuller *v.* Rowe, 57 N. Y. 23,	24,	1,	1874.
Fulton *v.* Central Bank Pittsburg, 11 N. 112,	185	2,	1879.
Funk *v.* Haskell, 132 Mass. 580,	58,	*a*,	1882.
Furnis *a.* Englis, 4 E. D. Smith 587,	163,	1,	1855.

Gaffney *v.* Hoyt, 10 Pac. Rep'r 34,	69,	13,	1886.
Gale *v.* Miller, 54 N. Y. 536,	171,	4,	1874.
Gano *a.* Moore, 12 Ohio 300,	158,	2,	1843.
Gano *v.* Samuel, 14 Ohio 593,	124,	4,	1846.
Ganzer *v.* Fricke, 1 Sm. 316,	69,	5,	1868.
Gardiner *v.* Conn, 34 O. St. 187,	210,	3,	1877.
Gardiner *a.* Reid, 65 N. Y. 578,	214,	1,	1875.
Gardner *v.* McCutcheon, 4 Beavan 534,	151,	4,	1842.
Garland, ex parte, 10 Ves. 110,	74,	4,	1804.
Garnet *a.* Ward, 6 Duer 257,	49,	4,	1857.

Table of Cases.

Garrick *a*. Burdick, L. R. 5 Ch. App. 233,	43,	1, *c*,	1870.
Gates *v*. Beecher, 60 N. Y. 518.	178,	5,	1875.
Gates *a*. Wells, 18 Barb. 554,	24,	1,	1854.
Gauger *a*. Pautz, 45 Wis. 449,	96,	2,	1878.
Gavit *v*. Supplee, 2 W. N. C. 561,	121,	9,	1876.
Gay *v*. Seibold, 97 N. Y. 472,	76,	15,	1884.
Gay *v*. Waltman, 8 N. 453,	120,	*b*,	1879.
Gaylord *v*. Imhoff, 26 O. St. 317,	103,	*a*,	1875.
Geddes' Appeal, { 34 L. I. 330, 3 Nor. 482,	111,	12,	1877.
Geery *v*. Cockroft, 1 J. & Sp. 146,	110, 167,	11, 5, *a*,	1871.
Gellar, ex parte, 1 Rose 297,	54,	1,	1812.
Gibbs *a*. Hogeboom, 7 Nor. 235	95, 121,	4, 12,	1878.
Gibson *a*. Bond, 1 Camp. 185,	115,	1,	1808.
Gibson *v*. Lupton, 9 Bing. 297,	7, 19, 49,	1, 2, 5,	1832.
Gibson *v*. Stone, 43 Barb. 285,	63,	2,	1865.
Gilbert *a*. Ryder, 16 Hun. 163,	25,	4,	1878.
Gillies *a*. Williams, 75 N. Y. 197,	10,	1,	1878.
Gillilan *v*. Ins. Co., 41 N. Y. 376,	133,	3,	1869.
Gilmore *a*. Moorehead, 27 Sm. 118,	127,	7,	1874.
Ginrich *a*. Walter, 2 Watts 204,	83,	4,	1834.
Gilpin *v*. Enderby, 5 B. Ald. 955,	208,	3,	1822.
Glasgow Bank *a*. Muir, 4 H. L. 337,	73,	2,	1879.
Gleason *a*. Farrand, 56 Vt. 633,	13,	1,	1884.
Glennie *a*. Mair, 4 M. & S. 240,	59,	2, *e*,	1815.
Goepper *v*. Kinsinger, 39 Ohio St. 429,	110,	6,	1883.
Goeway *a*. Townsend, 19 Wend. 424,	158,	1,	1838.
Goff, *a*. Reeves, Pen. 609,	158,	1,	1809.
Golden *a*. Mosgrove, 5 Out. 605,	76,	3,	1882.
Golden State Iron Works *v*. Davidson, 15 Pac. Rep'r 20,	171,	4,	1887.
Goldsmid *v*. Cosgrove, 7 H. L. 785,	205,	6,	1859.
Goodbar *v*. Cary, 16 Fed. Rep'r 316,	106, 107,	1, *b*, 4,	1882.
Goode *v*. Harrison, 5 B. Ald. 147,	69, 136,	20, 3,	1821.
Goodwin *a*. Mch's Bank, 1 Hal. Ch. 334,	112,	12,	1846.
Gordan *a*. Nanson, L. R. 1 Ap. Cas. 195,	204,	1,	1876.
Gordon *a*. Merrick, 20 N. Y. 93,	62,	*e*,	1859.
Gorman *a*. Alexander, 7 A. Rep'r 243,	105,	3,	1886.
Gould *v*. Gould, { 8 Cow. 168, 6 Wend. 263,	167,	1,	1828. 1830.
Goulding *v*. Bain, 4 Sandf. 716,	173,	5,	1852
Gouthwaite *v*. Duckworth, 12 East. 421,	19,	5,	1810.
Grace *v*. Smith, 2 Wm. Bl. 997,	55, 66,	1, 3,	1775.
Gram *v*. Caldwell, 5 Cow. 489,	186, 187,	1, 2,	1826.
Gram *v*. Seton, 1 Hall 262,	135,	7, *a* 8,	1828.
Grant *v*. Bryant, 101 Mass. 567,	35, 207,	2, 5,	1869.
Graser *v*. Stellwagen, 25 N. Y. 315,	114,	2,	1862.
Gratz *v*. Bayard, 11 S. & R. 41,	72,	1,	1824.

Table of Cases.

Gray *a.* Catskill Bank, 14 Barb. 471,	58,	1, *f*,	1851.
Green *v.* Beasley, 2 Bing., N. C., 108,	62,	*g*,	1835.
Green *a.* Boswell, 1 Dutch. 391,	133,	6,	1856.
Green *a.* F. & M. Bank, 1 Vr. 366,	177,	5,	1863.
Greene *v.* Greene, 1 Ohio 535,	112, 208,	13, 7,	1823. 1853.
Green *a.* Merrill, 55 N. Y. 270,	148,	3,	1873.
Green v. Willis, 5 Hill 232,	6,	2,	1843.
Greenham *v.* Gray, 4 Ir. C. L. 501,	50,	2,	1855.
Greenshaw *a.* Logan, 25 Fed. Rep'r 299,	112,	11,	1885.
Greenwald. *v* Kaster, 5 Nor. 45,	90,	3,	1878.
Greenwood *v.* Brink, 1 Hun. 227,	59,	3,	1874.
Greenwood *v.* Brodhead, 6 Barb. 593,	106,	5, *c*,	1850.
Gregg *a.* Smith, 9 Neb. 212,	76,	1,	1879.
Gregory *v.* Brooks, 1 Hun. 404,	12,	1,	1874.
Gregory *a.* Plumer, L. R. 18 Eq. 621,	140,	1,	1874.
Grey *a.* Greenham, 4 Ir. C. L. 501,	50,	2,	1855.
Grier *v.* Hood, 1 Casey 430,	122,	3,	1855.
Griffiths *a.* Caldicott, 8 Exch. 898,	16,	2,	1853.
Grimes *a.* Rothell, 35 N. W. 392,	192,	1, *a*,	1887.
Grinnell Mfg Co. *a.* Haddock, 16 W. N. 549,	37,	3, *g*,	1885.
Grinnell *a.* Richards, 63 Iowa 44,	51,	1,	1884.
Griswold *v.* Haven, 25 N. Y. 595,	139,	2,	1872.
Groom *a.* Price, 2 Exch. 542,	59,	2, *n*,	1848.
Grover *a.* Lamb, 47 Barb. 317,	59,	2, *b*,	1866.
Guetner *a.* McCullough, 1 Binn. 214,	119,	*d*,	1807.
Guidan *v.* Robson, 2 Camp. 302,	69,	21,	1809.
Guie *a.* Ash, 1 Out. 493,	16,	1,	1881.
Guild *v.* Belcher, 119 Mass. 257,	167,	5, *c*,	1876.
Guild *a.* Hubbard, 1 Duer 662,	133,	2,	1853.
Guillaume *a.* Delmonico, 2 Sandf. Ch. 366,	110,	3,	1809.
Guillou *v.* Peterson, 31 Leg. Int. 112, 8 Nor. 163,	41, 139, 141,	1, 5, 1,	1870. 1874. 1874.
Gulf City Paper Co. *a.* Rapier, 64 Ala. 330,	25,	1,	1877.
Gulick *v.* Gulick, 1 Harr. 186, 2 Green 578,	134, 157,	2, 2,	1837. 1835.
Gulick *a.* Princeton & K. Turnpike Co., 1 Harr. 161,	177,	4,	1837.
Guthrie *a.* Scott, 10 Bosw. 408,	170,	3,	1863.
Gwymne *v.* Holdredge, 3 C. E. Gr. 26,	208,	7,	1866.
Haas *a.* So. White Lead Co., 25 N. W. 493, 33 N. W. Iowa 657,	123,	1,	1887.
Hackett *a.* White, 20 N. Y. 178,	37,	3, *f*,	1859.
Haddock *v.* Grinnell Mfg. Co., 16 W. N. 549,	37,	3, *g*,	1885.
Haight *a.* Rosenfield, 53 Wis. 260,	52,		1881.
Haldeman *v.* Bank of Middletown, 4 Cas. 440,	127,	6,	1857.
Hale *v.* Henrie, 2 Watts 143,	111, 113,	11, 1, *c*,	1834.
Halfield *a.* Moses, 3 S. E. Rep'r 538,	117,	1,	1887.
Hall a. Burns, Pen. 984,	76,	2,	1812.
Hall *a.* Cassidy, 97 N. Y. 159,	64,	2,	1884.
Hall *v.* Lanning, 1 Otto 160,	119,	*b*,	1875.
Hall *a.* McLewee, 103 N. Y. 639,	64,	2,	1886.
Hall *a.* Tanner, 1 Barr, 417,	127,	2, *a* 4, *a*	1845.

Table of Cases.

Halsey *a.* Dob, 16 Johns. 34, - - - - - -	51,	2,	1819.
Hamill *v.* Purvis, 2 P. & W. 177, - - - - -	129,	3,	1830.
Hamilton, in re., 1 Fed. Rep'r 800, - - - - -	192,	3, *a*,	1880.
Hamilton *a.* Kendall, L. R. 4 App. Cas. 504, - -	76, 77, 92,	13, 3, 4,	1879.
Hamilton *a.* McKee, 33 O. St. 7, - - - - -	124,	3,	1877.
Hamilton *a.* Williams, 1 South 220, - - - - -	130,	3,	1818.
Hamilton's Appeal, 7 Out. 368, - - - - - -	120,	2,	1883.
Hammock *a.* Hankey, { 1 Buck, Cases in Bank'cy, 210, 3 Madd. 148, - - -	74,	6,	1786.
Hammond *a.* Holme, L. R. 7 Exch. 218, - - - -	75,	1,	1872.
Hampton *v.* Coddington, 1 Stew. 557, - - - -	133,	5,	1877.
Hampton *a.* Sumner, 8 O. 328; 365, - - - - -	112,	14,	1838.
Hanbury *a.* Fox, Cowp. 445, - - - - - -	27,	5,	1776.
Hancock *v.* Hintrager, 60 Iowa, 374, - - - -	69,	9,	1882.
Hanford *a.* Frost, 1 E. D. Sm, 540, - - - - -	134,	21,	1852.
Hankey *v.* Hammock, { 1 Buck, Cases in Bank'cy, 210, 3 Madd. 148, - - -	74,	6,	1786.
Hankinson *a.* Perrine, 6 Hal. 181, - - - - -	12,	1,	1829.
Hanna *v.* Wray, 27 Sm. 27, - - - - - - - -	121,	9,	1874.
Hanrahan *a.* Tolman, 44 Wis. 133, - - - - -	124,	1,	1878.
Hanson *a.* Barton, 2 Camp. 97; 2 Taunt. 49, - -	62,	*e*,	1809.
Harbert's (Sir William's) Case, 3 Rep. 14, - -	103,	7,	1585.
Hardenburgh *a.* Boeklen, 5 J. & Sp. 110, - - -	67,	6,	1874.
Hare *v.* Commonwealth, 11 Nor. 141, - - - -	106,	8, *h*,	1875.
Hare *a.* Hyat, Comb. 383, - - - - - - - -	5,	1,	1609.
Hargrave *v.* Conroy, 4 C. E. Gr. 281, - - - -	59,	*a*,	1868.
Hargrove *a.* McInroy, 16 L. T. 509, - - - -	49,	2,	1867.
Harper *v.* Fox, 7 W. & S. 142, - - - - - -	122,	1,	1844.
Harper *v.* Raymond, 3 Bosw. 29, - - - - -	171,	5,	1858.
Harris *a.* Beatson, { 19 Cent. L. J. 275, - - - 60 N. H. 83, - - - -	117,	2,	1884.
Harris *v.* Butterfield, 33 L. T. 639, - - - - -	17,	2,	1876.
Harris *a.* Dean, 33 L. T. 639, - - - - - -	17,	2,	1876.
Harris *v.* Fischer, 57 Geo. 229, - - - - - -	104,	2,	1876.
Harris *v.* Murray, 28 N. Y. 574, - - - - - -	37, 104,	*f*, 7,	1864.
Harris *v.* Peabody, 73 Me. 262, - - - - - -	193,	1,	1881.
Harris *v.* Sessler, 3 S. W. Rep'r 316, - - - - -	69,	2,	1887.
Harris *a.* Wolbert, 3 Hal. Ch. 605, - - - - -	206,	2,	1894.
Harrison *a.* Benners, 19 Barb. 53, - - - - -	8,	1,	1854.
Harrison *v.* Farrington, { 15 Stew. 353, - - - 10 A. Rep'r 105, - -	151,	1,	1885. 1887.
Harrison *a.* Goode, 5 B. & Al. 147, - - - - -	69, 136,	20, 3,	1821.
Hart *v.* Kelly, 2 Nor. 286, - - - - - - -	64,	4,	1877.
Hart *v.* Withers, 1 P. & W. 285, - - - - - -	135,	7, *a*,	1830.
Hartley *a.* Prosser, 29 N. W. Rep'r 156, - - -	103,	*c*,	1886.
Hartley *v.* White, 13 N. 31, - - - - - -	167,	7, *b*,	1880.
Hartley's Case, Rus. & R. 139, - - - - - -	59,	*k*,	1807.
Hartman *v.* Woehr, 3 C. E. Gr. 383, - - - - -	19, 207,	8, 1,	1867.
Harvey *v.* Childs, 28 O. St. 319, - - - - - -	64,	*e*,	1876.
Harvey *a.* Stillman, 47 Conn. 26, - - - - -	133,	4,	1879.
Hasbrouck *v.* Childs, 3 Bosw. 105, - - - - -	32,	1,	1858.
Hasbrouck a. Horner, 5 Wr. 169, - - - - -	100,	7,	1861.

Table of Cases.

Haskell *a.* Funk, 132 Mass. 580,	58,	*a*,	1882.
Hasson *a.* Rich, 4 Sandf. 115,	121,	13,	1850.
Haven *a.* Griswold, 25 N. Y. 595,	139,	2,	1872.
Hawkins *v.* Appleby, 2 Sandf. 421,	140,	3,	1849.
Hawley *v.* Hurd, 56 Vt. 617,	44,	2,	1884.
Hawley a. Shepard, 1 Conn. 367,	6,	2,	1815.
Hawn *v.* Land & Water Co., 16 P. Rep'r 196,	185,	*v*,	1887.
Hayden *a.* Rose, 35 Rand. 106,	10,	9,	1886.
Hayes *v.* Heyer, { 3 Sandf. 293, 4 Sandf. Ch. 485,	131, 187,	3, 3,	1849. 1847.
Hayes *a.* Remel, 83 Mo. 200,	69,	16,	1884.
Hayward *a.* Beach, 10 Ohio 455,	76,	11,	1841.
Hayward *a.* Parsons, 4 DeG. F. & J. 474,	207,	3,	1862.
Heartt *v.* Corning, 3 Paige, 566,	215,	1,	1832.
Heathcot *v.* Ravencroft, 2 Hal. Ch. 113,	181,	1,	1847.
Heimstreet *v.* Howland, 5 Denio 68,	62,	*b*,	1847.
Helion *a.* Webb, 3 Rob't 625,	208,	5,	1864.
Hellman *a.* Reis, 25 O. St. 180,	166,	1, *a*,	1874.
Helmore *v.* Smith, { 35 Ch. D. 436, 25 Ch. D. 449,	104, 183,	5, 1,	1885.
Helsby *v.* Mears, 5 B. & C. 504,	144,	2,	1826.
Hemingsway *a.* Rensheimer, 11 Casey 432,	104,	6,	1860.
Henarie *a.* Fish, 13 Pac. Rep. 193,	91,	2,	1886.
Henderson *v.* Lewis, 9 S. & R. 379,	130,	13,	1823.
Henderson *a.* Taylor, 17 S. & R. 453,	119,	*d*,	1828.
Henn *v.* Walsh, 2 Edw. Ch. 129,	173,	6,	1833.
Henrie *a.* Hale, 2 Watts 143,	{ 111, 113,	11, 1, *c*,	1834.
Hepburn *a.* Moore, 5 Barr 399,	83,	{ 1, 4,	1847.
Herrick *v.* Ames, 8 Bosw. 115,	215,	3,	1861.
Hervey *v.* Van Pelt, 4 Bosw. 60,	146,	3,	1859.
Hesketh *v.* Blanchard, 4 East. 144,	48,	3,	1803.
Hettrick *a.* Bendell, 3 J. & Sp. 405,	69,	21,	1873.
Heustis *a.* Patton, 2 Dutch. 293,	12,	1,	1857.
Heyer *a.* Hayes, { 3 Sandf. 293, 4 Sandf. Ch. 485,	131, 187,	3,	1849. 1847.
Heyhoe *v.* Burge, 9 C. B. 431,	58,	*g*,	1850.
Hicken, ex parte, 3 DeG. J. & S. 662,	59,	*f*,	1852.
Hickle *a.* Valentine, 39 Ohio St. 19,	19,	7,	1883.
Hickman *a.* Cox, 8 H. L. 268,	59,	*l*, *p*,	1860.
Hicks *a.* Brown, 24 Fed. Rep'r 811,	59,	*e*,	1885.
Higgins *v.* Armstrong, 10 Pac. Rep'r 232,	15,	4,	1886.
Higgins *v.* Rector, 47 Texas, 361,	193,	1,	1877.
Higgins *v.* Rockwell, 2 Duer 650,	87,	2,	1853.
Hill *v.* Beach, 1 Beas. 31,	{ 165, 208,	1, 2,	1858.
Hill *a.* Laecy, { 4 Ch. Div. 237, 3 Ap. Cas. 94,	166,	4, *a*,	1876. 1877.
Hill *v.* Sheibley, 68 Ga. 556,	51,	1,	1882.
Hill *v.* Smalley, 8 Vr. 103,	173,	8,	1874.
Hill *a.* Smith, 45 Verm. 372,	69,	12,	1850.
Hill *v.* Voorhees, 10 Harris, 68,	69,	17,	1853.
Hills *a.* Tanner, 48 N. Y. 662,	12,	1,	1872.
Hilton *v.* McDowell, 87 N. C. 364,	121,	4,	1882.
Hine *a.* Bank, Citizens, 49 Conn. 236,	23,	3,	1881.
Hintrager *a.* Hancock, 60 Iowa, 374,	69,	9,	1882.

TABLE OF CASES.

Hoare *v.* Dawes, 1 Doug. 371,	7, 49,	3, 6,	1780.
Hobensack *a.* Mershon, 2 Zab. 372,	69,	10,	1850.
Hobbs *v.* McLean, 117 U. S. 567,	36,	1,	1886.
Hodgman *v.* Smith, 13 Barb. 302,	59,	3,	1852.
Hoeflinger *v.* Wells, 47 Wis. 628,	124,	6,	1879.
Hoffman *a.* Knerr, 15 Sm. 126,	157,	4,	1870.
Hoffman *v.* Steinbeisser, 11 W. N. (C. P. 4) 383,	190,	1,	1881.
Hogeboom *v.* Gibbs, 7 Nor. 235,	95, 121,	4, 12,	1878. 1879.
Hoglan *a.* Young, 52 Cal. 467,	156,	6,	1877.
Holdane *v.* Butterworth, 5 Bosw. 1,	69,	15,	1859.
Holden *a.* Davidson, 10 At. Rep'r 515,	69,	10,	1887.
Holdredge *v.* Gwynne, 5 C. E. Gr. 26,	208,	7,	1866.
Holland *a.* Austin, 69 N. Y. 571,	177,	2,	1877.
Holland *v.* Drake, 29 O. St. 441,	131,	3,	1876.
Hollemback *v.* More, 44 N. Y. Sup'r Ct. 107,	41,	2,	1878.
Hollingshead *a.* Reed, 8 B. & C. 878,	52,		1825.
Hollister *a.* Salt Lake City, 118 U. S. 256,	24,	7,	1886.
Holme *v.* Hammond, L. R. 7 Exch. 218,	75,	1,	1872.
Holmes *a.* Brophy, 2 Molloy Ir. Ch. 1,	48,	3, *a*,	1828.
Holmes *v.* Kortlander, 31 N. W. Rep'r 532,	135,	5, *a*,	1878.
Holmes *a.* Low, 2 C. E. Gr. 148,	180,	4,	1864.
Holmes *v.* U. Ins. Co., 2 Johns. Cas. 329,	7,	1,	1801.
Holthouse *a.* Kountz, 4 Nor. 235,	144,	7,	1877.
Homer *v.* Wood, 11 Cush. 62,	167,	2, *b*,	1853.
Hone *a.* Perring, 4 Bing. 28,	153, 160,	2, 1,	1826.
Hood *a.* Grier, 1 Casey 430,	122,	3,	1855.
Hood *v.* Riley, 3 Gr. 127,	130, 131,	10, 3, *b*	1835.
Hook *a.* Denithorne, 2 Am. 240,	69,	3,	1886.
Hooker *a.* Wright, 10 N. Y. 51,	44,	8,	1854.
Hopkins *v.* Thomas, 28 N. W. Rep'r 147,	128,	1,	1881.
Hopkins *a.* Walstrom, 7 Out. 118,	95, 149,	5, 1,	1883.
Horbach *v.* Huey, 4 Watts 455,	76, 130,	3, 1, *a*	1835.
Horn *a.* Dillon, 5 How. Pr. 35,	189,	1,	1850.
Horner *v.* Hasbrouck, 5 Wr. 169,	100,	7,	1861.
Horner *a.* Jones, 10 Sm. 214.	118,	*a*,	1869.
Hoskinson *v.* Eliot, 12 Sm. 393,	86,	1,	1869.
Hotchkiss *v.* English, 4 Hun 369,	17,	4,	1875.
House *a.* Drennen, 5 Wr. 30,	69, 121,	5, 2,	1861.
Houseal's Appeal, 9 Wr. 484,	202,	2,	1863.
Hovey *a.* Rianhard, 13 Ohio 300,	24,	2,	1844.
Howard *a.* Buffalo City Bank, 35 N. Y. 500,	69, 106, 200,	19, 4, *b*, 1,	1866.
Howard *v.* Kyte, 28 N. W. R. 609,	12,	1,	1886.
Howard *v.* McLaughlin, 2 Out. 440,	192,	2, *a*,	1881.
Howard *a.* Smith, 20 How. Pr. 121,	106,	9, *b*,	1859.
Howell *v.* Adams, 68 N. Y. 315,	177,	4,	1877.
Howell *v.* Brodie, 6 Bing. N. C. 44,	18,	4,	1839.
Howell *a.* Davis, 20 Am. Law Reg'r, N. S., 461,	108,	8,	1861.
Howell *a.* Decker, 42 Cal. 636,	15,	6,	1872.

Howell *a.* Reynolds, L. R. 8 Q. B. 398, - - - -	119,	1,	1873.
Howell *a.* Ross, 3 Nor. 129, - - - - - -	95, 122,	*d* 4,	1877.
Howell *v.* Teel, 2 Stew. 490, - - - - - -	111,	1, 5,	1878.
Howland *a.* Heimstreet, 5 Denio 68, - - - - -	62,	*b*,	1847.
Hoxie *v.* Chaney, 143 Mass. 592, - - - - -	209,	1, *c*,	1887.
Hoyt *v.* Bennett, 59 N. Y. 538, - - - - - -	86;	3,	1872.
Hoyt *a.* Gaffney, 10 Pac. Rep'r 34, - - - - -	69,	13,	1886.
Hoyt *v.* Sprague, 103 U. S. 613, - - - - - -	106,	5, *f*,	1880.
Hoyt's Appeal, 2 Out. 257, - - - - - - -	111,	8,	1881.
Hubbard *v.* Guild, 1 Duer 662, - - - - - -	133,	2,	1853.
Hubbard *v.* Matthews, 54 N. Y. 43, - - - -	173,	3,	1873.
Hubbuck *a.* Attorney General, 10 Q. B. D. 488, 13 Q. B. D. 275, -	109,	4,	1883. 1884.
Huey *a.* Horbach, 4 Watts 455, - - - - - -	76, 130,	3, 1, *a*	1835.
Hulit *a.* Jaques, 1 Harr. 38, - - - - - -	157,	1,	1837.
Hull *a.* Vanderburgh, 20 Wend. 70, - - - - -	59,	*c*,	1838.
Hulschizer *a.* Craig, 5 Vr. 363. - - - - - -	167,	2, *a*,	1871.
Hulse's Estate, 12 Phila. 130, - - - - - - 11 W. N. 449, - - - - - -	172,	2,	1878. 1882.
Hunt *a.* Burnell, 5 Jur. 650, - - - - - -	18,	1,	1841.
Hunt *v.* Erikson, 57 Mich. 330, - - - - - -	51,	1,	1885.
Hunter *a.* Young, 4 Taunt. 583, - - - - - -	20,	2,	1812.
Huntington *a.* Moore, 7 Hun 425, - - - - -	67,	11,	1876.
Hurd *a.* Hawley, 56 Vt. 617, - - - - - -	44,	2,	1884.
Hutchinson *v.* Onderdonk, 2 Hal. Ch. 277, - -	188,	2,	1847.
Hutchinson *a.* Onderdonk, 2 Hal. Ch. 632, E. & A. -	188,	2,	1849.
Hutchinson *a.* Sharp, 100 N. Y. 533, - - - -	37,	1,	1885.
Hutzler *v.* Phillips, 1 S. E. Rep'r 502, - - - -	108,	5,	1887.
Hyat *v.* Hare, Comb. 283, - - - - - - -	5,	1,	1609.
Hyde *a.* Leggett, 58 N. Y. 272, - - - - - -	52,		1874.
Idell *a.* Coddington, 3 Stew. 540, - - - - -	208,	4,	1879.
Idell *a.* Coddington, 2 Stew. 504, - - - - -	210,	4,	1878.
Ihmsen *v.* Negley, 1 Casey, 297, - - - - -	126,	3,	1855.
Ihmson *v.* Lathrop, 8 Out. 365, - - - - - -	69,	2,	1883.
Imhoff *a.* Gaylord. 26 O. St. 317, - - - - -	103,	*a*,	1875.
Impson *a.* Atwood, 5 C. E. Gr. 151, - - - - -	106,	1, *a*,	1869.
Ingalls *a.* Julio, 1 Allen, 41, - - - - - -	35,	3,	1861.
Insurance Co., Fireman's, *v.* Floss, 10 A. Rep. 139. -	144,	4,	1887.
Insurance Co. *a.* Gillilan, 41 N. Y. 376, - - - -	133,	3,	1869.
Insurance Co., Hamilton Fire, *v.* Kimball, 8 Bosw. 495,	114,	2,	1861.
Insurance Co. *a.* Mallery, 51 Conn. 222, - - - -	25,	2,	1883.
Insurance Co., Northern, *v.* Potter, 63 Cal. 157, -	90,	3,	1883.
Insurance Co., Sun, *v.* Kountz Line, 122 U. S. S. C. R. 583,	69,	11,	1886.
Irwin *a.* Bidwell, 22 Sm. Pa. 244, - - - - -	18,	4,	1872.
Irwin *v.* Riegle, 34 Leg. Int. 447, - - - - -	129,	1,	1877.
Irwine *a.* Sutton, 12 S. & R. 13, - - - - - -	129,	1,	1824.
Isles *v.* Tucker, 5 Duer 393, - - - - - -	137,	6,	1856.
Jackson *a.* Cross, 5 Hill, 478, - - - - - -	76.	5,	1843.
Jackson *v.* Litchfield, 8 Q. B. D. 474, - - - -	77,	*c*,	1882.

Table of Cases.

Jackson *v.* Miller, 1 Dutch. 90,	138,	2,	1855.
Jackson *a.* Skaife, 3 B. & C. 421,	167,	3,	1824.
Jackson *a.* Smith, 2 Ed. Ch. 28,	13, 109, 112,	3, 3, 16, *a*,	1833.
Jacques *v.* Marquand, 6 Cowen, 497,	40,	3,	1826.
Jacquin *v.* Buisson, 11 How. Pr. 385,	75,	3,	1855.
James *a.* Bates, 3 Duer 45,	167,	5, *b*,	1854.
James *a.* Mattock, 2 Beas. 126,	110, 112,	8, 11, *q*,	1860.
James *v.* Pope, 19 N. Y. 324,	176,	1,	1859.
James *a.* Rizer, 26 Kan. 221,	69,	16,	1881.
Janes *v.* Whitbread, 11 C. B. 406,	59,	*n*,	1851.
Jaques *v.* Hulit, 1 Harr. 38,	157,	1,	1837.
Jaquette *a.* Brown, 13 Nor. 113,	12,	1,	1880.
Jardine *a.* Scarf, 7 App. Ca. 345,	70,	1,	1882.
Jarvis *a.* Dunham, 8 Barb. 88,	67, 152,	2, 2,	1854.
Jaycox *a.* Turner, 40 N. Y. 470,	106, 170,	9, *b*, 3,	1869.
Jenkins *v.* Barrow, 35 N. W. Rep'r 510,	156,	1,	1887.
Jennings *v.* Rickard, 15 Pac. Rep'r 677,	151,	2,	1887.
Jessup *v.* Cook, 1 Hal. 434,	215,	1,	1798.
Johnson *v.* Buttler, 4 Stew. 35,	206,	1,	1879.
Johnson *a.* Cammack, 1 Gr. Ch. 83,	76,	23,	1839.
Johnson *v.* Evans, 7 M. & G. 240,	100,	1,	1844.
Johnson *a.* Farr, 25 Ill. 522,	36,	6,	1861.
Johnson, in re, 15 Ch. D. 548,	74,	10,	1880.
Johnson *v.* Kaiser, 11 Vr. 286,	130,	5, *a*,	1878.
Johnson *v.* Miller, 16 Ohio 431,	67,	11,	1847.
Johnson v. Stear, 109 Engl. Com. L. Rep'r, 57 N. S. 341, n.	47,	3, *b*,	1869.
Johnson *a.* Tenney, 43 N. H. 144,	194,	3,	1864.
Johnson's Appeal, 5 Am. 129,	212,	6,	1886.
Johnston *v.* Bernheim, 86 N. Car. 339,	115, 134, 152,	3, 4, 1.	1882.
Johnston *v.* Straus, 26 Fed. Rep'r	106, 107,	1, *d*, 4,	1882.
Jones' Appeal, 20 Sm. 169,	113,	*h*,	1871.
Jones *v.* Battin, 6 Casey, 84,	135,	5, *a*,	1857.
Jones *v.* Butler, 87 N. Y. 613,	32,	3.	1882.
Jones *v.* Clark, 42 Cal. 180,	15,	1,	1871.
Jones *v.* Dexter, 125 Mass. 469, 130 Mass. 380,	100,	8,	1878. 1881.
Jones *v.* Foxall, 15 Beav. 388,	42,	3,	1852.
Jones *v.* Horner, 10 Sm. 214,	118,	*a*,	1869.
Jones *v.* Lloyd, L. R. 18 Eq. 265,	173,	11,	1874.
Jones *a.* Pettingill, 28 Kan. 749,	158,	3,	1882.
Jones *a.* Voorhees, 5 Dutch. 270,	52,		1865.
Jones *v.* Walker, 103 U. S. 444,	74,	3,	1880.
Jones *a.* White, 1 Rob't 321,	209,	1, *b*,	1863.
Jordan *a.* Fogerty, 2 Rob. 319,	121,	4,	1864.
Judge *v.* Braswell, 13 Bush 67,	15,	4,	1887.
Jukes *a.* Kilshaw, 3 B. & S. 847, 32 Law J. Q. B. 217, 9 Jurist, N. S. 1231,	64,	*a*,	1863.
Julio *v.* Ingalls, 1 Allen 41,	35,	3,	1861.
June *a.* Betts, 51 N. Y. 274,	184,	2,	1873.

Table of Cases.

Kain's Appeal, 11 Nor. 276,	106,	8,	*i*,	1879.
Kaiser *v.* Fendrick, 2 Out. 528,	129,	1,		1881.
Kaiser *a.* Johnson, 11 Vr. 286,	130,	5,	*a*,	1878.
Kane *a.* Meason, 13 Sm. 335,	10, 121,	6, 1,		1869.
Kapp *v.* Barthan, 1 E. D. Sm. 622,	215,	4,		1852.
Kaster *a.* Greenwald, 5 Nor. 45,	90,	3,		1878.
Kauffman *v.* Fisher, 3 Grant 302,	122,	6,		1860.
Kayser *v.* Maugham, 8 Col. 232,	51,	2,		1885.
Keegan *v.* Cox, 116 Mass. 289,	137,	2,		1874.
Keim *a.* Sparman, 83 N. Y. 245,	136,	4,	*a*,	1880.
Keller *a.* Secor, 4 Duer 414,	76,	13,		1855.
Kelley *a.* Berry, 4 Rob. 106,	194,	2,		1866.
Kellogg *a.* Wilcox, 11 Ohio 394,	194, 200,	1, 1,		1842.
Kelly *a.* Hart, 2 Nor. 286,	64,	4,		1877.
Kelly *a.* Walsh, 27 How. Pr. 559, 42 Barb. 98,	106,	9,	*b*,	1864.
Kemp *a.* Carnley, 3 Duer 1,	131,	2,		1853.
Kendall *v.* Hamilton, L. R. 4 App. Cas. 504,	76, 77, 91,	13, 13, 4,		1879.
Kennady *a.* Mecutchen, 3 Dutch 230,	126,	6,		1858.
Kennedy *a.* Dennis, 19 Barb. 517,	24,	1,		1854.
Kenney *v.* Altvater, 27 Sm. 34,	177,	1,		1874.
Kenney *a.* Bank, Fayette Nat., of Lexig'n, 49 Ky. 133,	195,	4,		1880.
Kepler *v.* Erie Dime S. & L. Co., 5 Out. 602,	111,	3,		1882.
Keyes *a.* Davis, 38 N. Y. 94,	175,	3,		1868.
Kilshaw *v.* Jukes, 3 B. & S. 847, 32 Law J. Q. B. 217, 9 Jurist, N. S. 1231,	64,		*a*,	1863.
Kimball *v.* Hamilton Fire Insurance Co., 8 Bosw. 495,	114,	2,		1861.
King *a.* Morriset, 2 Bur. 891,	66,	1,		1759.
King *v.* Sarria, 69 N. Y. 24,	37,	3,	*a*,	1877.
King *v.* Wilcomb, 7 Barb. 263,	110,	7,		1849.
King *a.* Woodruff, 47 Wis. 261,	184,	4,		1879.
King's Appeal, 9 Barr. 124,	106,	8,	*a*,	1848.
Kingsbury *v.* Tharp, 28 N. W. R. 74,	21,	2,		1886.
Kinney *a.* Cowan, 33 Ohio St. 442,	69,	17,		1878.
Kinsinger *a.* Goepper, 39 Ohio St. 429,	110,	6,		1883.
Kirkwood *a.* Solomon, 55 Mich. 256,	174,	1,	*a*,	1884.
Kistler *a.* Bowman, 9 Casey 106,	79, 90,	1, 1,		1859.
Kitchen *v.* Lee, 11 Paige Ch. 107,	147,	1,		1844.
Klein *a.* Shanks, 14 Otto 18,	106, 110,	7, 5,	*a*,	1881.
Knerr *v.* Hoffman, 15 Sm. 126,	157,	4,		1870.
Knickerbocker *a.* Woodling, 31 Minn. 268,	140,	4,		1883.
Knott *v.* Knott, 6 Oregon 142,	36,	6,		1876.
Knowles *a.* Lyon, 3 B & S. 556,	62,		*c*,	1863.
Kohn *a.* Sparrow, 3 E. R. 293,	76,	16,		1885.
Koningsburg *v.* Launitz, 1 E. D. Sm. 215,	101, 179,	1, 1,		1851.
Kortlander *a.* Holmes, 31 N. W. Rep'r 532,	135,	5,	*a*,	1887.
Kountz *v.* Holthouse, 4 Nor. 235,	144,	7,		1877.
Kountz Line *a.* Sun Insurance Co., 122 U. S. S. C. R. 583,	69,	11,		1886.

Kramer *v.* Arthurs, 7 Barr 165,	8, 109,	2, 7,		1847.
Kremer *a.* Reed, 1 Am. 482,	69,	5,		1886.
Kyte *a.* Howard, 28 N. W. R. 609,	12,	1,		1886.
Labouchere *v.* Tupper, 11 Moore, P. C., 198,	73,	1,		1857.
Lacey *v.* Hill, 4 Ch. D. 237, 3 Ap. Cas. 94,	166,	4,	*a*,	1876. 1877.
Lafitte *a.* Chaffaix, 30 La. An. 631,	57, 61,	3, 4,		1878.
Lafond *v.* Deems, 81 N. Y. 507	16,	1,		1880.
Lahens *a.* Fielden, 9 Bosw. 436,	125,	1,		1862.
Laird *v.* Chisholm, 30 Scotish Jur. 584,	39, 42, 42,	1, 1, 4,	 *a*,	1858.
Lamb *v.* Grover, 47 Barb. 317,	59,		*b*,	1866.
Lambert's Case, Godbolt 339,	5,	2,		1614.
Lambeth *a.* Marshall, 7 Rob. L. A. 47,	37,	3,	*a*,	1844.
Lampton *v.* Collingwood, 4 Mod. 315,	103,	8,		1695.
Land & Water Co. *a.* Hawn, 16 P. Rep'r 196,	185,	1,		1887.
Lane *a.* Leverson, 13 C. B. (N. S.) 278, 106 E. C. L.	129. 169,	5, 2,		1862.
Lane *v.* Thomas, 37 Tex. 157,	211,	1,		1872.
Lane *v.* Williams, 2 Vern. 277,	5,	3,		1692.
Langdale, ex parte, 18 Ves. Jr. 300,	21,	1,		1811.
Lanning *a.* Hall, 1 Otto 160,	119,		*b*,	1875.
Large *v.* Ditmars, 12 C. E. Gr. 283,	208,	8,		1876.
Lasley *a.* Yeoman, 40 O. S. 190,	8,	2,		1883.
Laswell *a.* Robins, 27 Ill. 365,	25,	6,		1862.
Lathrop *a.* Butterfield, 21 Sm. 225,	67,	10,		1872.
Lathrop *a.* Ihmson, 8 Out. 365,	69,	2,		1883.
Latshaw *v.* Steinman, 11 S. & R. 357,	94, 95,		*a*, *a*,	1824.
Lauffer *v.* Cavett, 6 Nor. 479,	9, 111,	2, 2,		1878.
Laughlin *v.* Lorenz, 12 Wr. 275,	71, 154,	2, 1,		1864.
Launitz *a.* Koningsburg, 1 E. D. Sm. 215,	101, 179,	1, 1,		1851.
Law *a.* Roberts, 4 Sandf. 642,	210,	1,		1851.
Lawrence *v.* Bacheller, 131 Mass. 504,	37,	3,	*a*,	1881.
Lawrence *v.* Sebor, 2 Caines 505,	103,	10,		1804.
Lawrence *a.* Williams, 47 N. Y. 462,	67,	4,		1872.
Leaf's Appeal, 9 Out. 505,	109,	8,		1884.
Leask *a.* Pole, 9 Jurist, N. S., 829,	69,	9,		1863.
Leavitt *a.* Nicholson, 4 Sandf. 252,	170,	1,		1850.
Leavitt *v.* Peck, 2 Conn. 124,	152,	1,		1819.
Lee *a.* Kitchen, 11 Paige Ch. 107,	147,	1,		1844.
Lee *v.* Orr, 11 Pacif. R. 745,	76,	1,		1886.
Lefevre's Appeal, 19 Sm. 22,	111, 113,	11, 1,	 *d*,	1871.
Leggett *v.* Hyde, 58 N. Y. 272,	52,			1874.
Lennig *v.* Lennig, 11 W. N. 18,	188,	1,		1881.
Lennon *a.* Walsh, 98 Ill. 27,	118,		*c*,	1881.
Lesley *v.* Wiley, 47 N. Y. 648,	76,	12,		1872.
Levan *a.* Anderson, 1 W. & S. 334,	83,	3,		1841.

Leverick *a.* Pringle, 97 N. Y. 181,	146,	3,	1884.
Leverson *v.* Lane, 13 C. B. (N. S.) 278,	129,	5,	1862.
106 E. C. L.	169,	2,	
Levy *v.* Brush, 45 N. Y. 589,	10,	3,	1871.
Levy *v.* Cadet, 17 S & R. 126,	178,	6,	1827.
Lewis *a.* Henderson, 9 S. & R. 379,	130,	13,	1823.
Lewis *a.* Locke, 124 Mass. 1,	37,	3, *g*,	1878.
Lewis *a.* United States, 13 Nat. Bank'cy Regr 33,	204,	3,	1876.
Lewis *v.* Webber, 116 Mass. 450,	194,	5,	1875.
Lewis *v.* Williams, 6 Wh. 263,	83,	2,	1841.
Lidgerwood *a.* Thursby, 69 N. Y. 198,	117,	1,	1877.
Lindley *v.* Davis, 13 P. Rep. 118,	103,	*c*,	1887.
Linford *v.* Linford, 4 Dutch. 113,	192,	2,	1859.
Linn v. Ross, 1 Harr. 55,	140,	2,	1837.
Lipincott *a.* Wisham, 1 Stock. 353,	78,	1,	1853.
	111,	4,	
Lipsey *a.* Carter, 70 Geo. 417,	39,	2,	1883.
Litchfield *a.* Jackson, 8 Q. B. D. 474,	77,	*c*,	1882.
Littlefield *a.* Cunningham, 1 Edw. Ch. 104,	158,	3,	1831.
Livingston *v.* Blanchard, 130 Mass. 341,	31,	7,	1881.
Livingston *v.* Lynch, 4 Johns. Ch. 573,	135,	4, *a*,	1820.
Lloyd, in re., 22 Fed. Rep'r 90,	196,	2,	1884.
Lloyd *a.* Jones, L. R. 18 Eq. 265,	173,	11,	1874.
Lloyd *v.* Thomas, 29 Sm. 68,	184,	6,	1875.
Lock *v.* Lynam, 4 Ir. Ch. 188,	151,	3,	1854.
Locke *v.* Lewis, 124 Mass. 1,	37,	3, *g*,	1878.
Lockwood *a.* Ralph, 61 Cal. 155,	76,	17,	1882.
Loeschick *v.* Addison, 3 Rob. 331,	192,	1,	1865.
Logan *a.* Cragin, 27 La. An. 352,	79,	*a*,	1875.
Logan *v.* Greenshaw, 25 Fed. Rep'r 299,	112,	11,	1885.
Long, in re, 7 N. Bank'cy Reg'r 227,	106,	2, *c*,	1874.
	107,	3,	
Long *v.* Seavers, 7 Out. 517,	12,	1,	1883.
Long *a.* Townsend, 27 Sm. 143,	148,	4,	1874.
Lorah *a.* Todd, 25 Sm. 155,	169,	1,	1874.
Lord Abergavenny's Case, 6 Rep. 79,	103,	2,	1608.
Lord *v.* Proctor, 7 Phila. 630,	64,	*c*,	1870.
Lord *a.* Schulten, 4 E. D. Smith 206,	76,	14,	1855.
Lorenz *a.* Laughlin, 12 Wr. 275,	71,	2,	1864.
	154,	1,	
Loring *a.* Smith, 2 Ohio 440,	126,	1,	1825.
	167,	8, *a*,	
	192,	3,	
Lothrop *v.* Adams, 135 Mass. 469,	140,	4,	1882.
Loucks *a.* Averill, 6 Barb. 19,	93,	1,	1849.
	110,	10,	
Loucks *v.* Martin, 9 A. Rep'r 279,	146,	2,	1887.
Love *v.* Rhyne, 86 No. Car. 572,	156,	1,	1882.
Low *v.* Holmes, 2 C. E. Gr. 148,	180,	4,	1864.
Lowrey *a.* Ruth, 10 Neb. 260,	76,	1,	1880.
Luce *v.* Snively, 4 Watts 396,	100,	7,	1835.
Ludlam *a.* Buckingham, 2 Stew. 343. E. & A.	165,	3,	1878.
	208,	4,	
Luer *v.* Waydell, 3 Denio 410,	184,	5,	1846.
Lupton *a.* Gibson, 9 Bing 297,	7,	1,	1832.
	19,	2,	
	40,	5,	
Lynam *a.* Lock, 4 Irish Ch. 188,	151,	3,	1854.

Lynch *a.* Livingston, 4 Johns. Ch. 573,	135,	4, *a*,	1820.
Lynch *a.* Staughton, 6 Johns. Ch. 467,	208,	6,	1815.
Lynch *v.* Thompson, 61 Miss. 354,	52,		1883.
Lyon *v.* Knowles, 3 B. & S. 556,	62,	*c*,	1863.
Lyon *a.* Yates, 61 N. Y. 344,	137,	2,	1874.
MacDowell *a.* Dean, 8 Ch. Div. 345,	151,	6,	1877.
Mackall *a.* Owens, 33 Md. 372,	72,	2,	1870.
Mackey *a.* Earon, 10 Out. 452,	68,	3,	1884.
Macmillan, Ex parte, 24 L. T. 143,	207,	2,	1871.
Magee *a.* Potter, Pamphlet U. S. C. C. 21,	106, 107, 108,	5, *d*, 1, 2,	1878.
Maguire *a.* Duff, 107 Mass. 87,	161,	5,	1871.
Mahagan *v.* Mead, 63 N. H. 130,	10,	11,	1884.
Mahoney *a.* Devoney, 8 C. E. Gr. 247,	28, 110, 111,	3, 9, 15,	1872.
Mair *v.* Beck, 4 E. Rep'r 855,	120,	2,	1886.
Mair *v.* Glennie, 4 M. & S. 240,	59,	*e*,	1815.
Mallery *v.* Insurance Co., 51 Conn. 222,	25,	2,	1883.
Mallory *v.* Russell, 32 N. W. Rep'r 102,	112,	14,	1887.
Maltby *a.* Anderson, 4 Br. Ch. 422, s. c. 2 Ves. Jr. 244,	106,	2, *a*,	
Mandeville *a.* Burrell, 2 How. 560,	74,	4,	1844.
Mandeville *a.* Sheehy, 6 Cranch 253,	93,	1,	1810.
Manhattan B. & Mfg. Co. *v.* Sears, 45 N. Y. 797,	51,	1,	1871.
Manhattan Ins. Co. *v.* Webster, 9 Sm. 227,	103,	10,	1868.
Manufg. & Mer. Co. of Sandusky *v.* Schooly, Tappan 233,	76,	7,	1818.
Manville *v.* Parks, 7 Col. 128,	51,	2,	1883.
Markham *a.* Tellyett, 57 Geo. 11,	32,	1,	1876.
Markle *a.* Pardee, 17 W. N. C. 211,	151,	1,	1886.
Marmaduke *a.* Cothran, 60 Texas 370,	59,	3,	1883.
Marsh *v.* Davis, 33 Rand. 326,	10,	7,	1885.
Marsh *v.* Russell, 66 N. Y. 288,	211,	2,	1876.
Marshall *v.* Lambeth, 7 Rob., La. 47,	37,	3, *a*,	1844.
Marquand *a.* Jaques, 6 Cowen 497,	40,	3,	1826.
Martin *a.* Brooks, 2 Wall. 70,	211,	3,	1874.
Martin *a.* Loucks, 9 Atl. Rep'r 279,	146,	2,	1887.
Marx *a.* Miller, 65 Texas 131,	58,	*g*,	1885.
Mason *v.* Eldred, 6 Wall. 231,	82,	3,	1879.
Mason *v.* Partridge, 66 N. Y. 633,	134,	5,	1876.
Mateer *a.* Commonwealth, 16 S. & R. 419, 416,	89, 103,	1, 8,	1827.
Matherson *v.* Wilkinson, 8 Atl. Rep'r 84,	130,	1, *b*,	1887.
Matthews *a.* Hubbard, 54 N. Y. 43,	173,	3,	1873.
Matthews *a.* McStea, 50 N. Y. 166,	17,	3,	1872.
Matthews *a.* Oliphant, 16 Barb. 608,	76,	20,	1853.
Matthews *a.* Wilcox, 44 Mich. 192,	57,	4,	1880.
Mattock *v.* James, 2 Beas. 126,	110, 112,	8, 9, 11,	1860.
Maugham *a.* Kayser, 8 Col. 232,	51,	2,	1885.
Mauney *v.* Coit, 86 N. C. 463,	52,		1882.
May *a.* Adams, 27 Fed. R. 907,	76,	1,	1886.
Mayberry *v.* Willoughby, 5 Neb. 368,	178,	7,	1877.

Mayo *a.* Barker, 129 Mass. 517, - - - - - -	165,	4,	1880.
Mayou, Ex parte, 4 DeG. J. & S. 664, - - - -	107,	5,	1865.
McAvoy *v.* Wright, 137 Mass. 206, - - - - -	47,	1,	1884.
McBurney *a.* Cox, 2 Sandf. 561, - - - - -	112,	8,	1849.
McChesney *a.* City Bank of Brooklyn, 20 N. Y. 240,	177,	3,	1859.
McClure *a.* Porter, 15 Wend. 187, - - - - -	7, 44,	2, 4,	1836.
McCormick's Appeal, 5 Sm. 252, - . . - -	106, 163, 202,	7, *b*, 2, 1,	1866.
McCormick's Appeal, 7 Sm. 54, - - - - -	10, 113,	8, 1, *e*,	1868.
McCowin *v.* Cubbison, 22 Sm. 358, - - - - -	178, 183,	4, 1,	1872.
McCoy *a.* Potter, 2 Casey 458, - - - - - -	135,	2,	1856.
McCredy v. Vanneman, Pen. 870, - - - - -	76,	2,	1811.
McCullough *v.* Guetner, 1 Binn. 214, - - - -	119,	*d*,	1807.
McCutcheon *a.* Gardner. 4 Beavan 534, - - - -	151,	4,	1842.
McDonald *a.* Smith, 1 South. 103, - - - - -	76,	5,	1818.
McDowell *a.* Hilton, 87 N. C. 364, - - - - -	121,	4,	1882.
McEwen, in re, 12 Nat. Bank'cy Reg'r 11, - -	105, 193,	3, 1,	1875.
McFall *a.* Williams, 2 S. & R. 281, - - - - -	81,	2,	1816.
McGovern *a.* Yoho, 42 O. St. 11, - - - - -	84,	2,	1884.
McGregor *v.* Cleveland, 5 Wend. 475, - - - -	44, 76,	6, 24,	1830.
McInroy *v.* Hargrove, 16 L. T. 509, - - - -	49,	2,	1867.
McIntosh *a.* Robinson, 3 E. D. Sm. 221, - - - -	207,	1,	1854.
McKee *v.* Bank of Mt. Pleasant, 7 Ohio 463, - -	117,	4,	1836.
McKee *v.* Hamilton, 33 Ohio St. 7, - - - - -	124,	3,	1877.
McKesson *a.* Adams, 3 Sm. 81, - - - - - -	12,	1,	1866.
McKinney *v.* Brights, 4 Har. 399, - - - - -	168,	3,	1851.
McKnight *v.* Ratcliff, 8 Wr. 156, - - - - -	142,	1,	1863.
McKnight *a.* Robbins, 1 Hal. Ch. 645, E. & A. -	51, 67,	1, 9,	1847.
McLaughlin *a.* Howard, 2 Out. 440, - - - - -	192,	2, *a*,	1881.
McLean *a.* Hobbs, 117 U. S. 567, - - - - -	36,	1,	1886.
McLean, in re, 15 Nat. Bank'cy Reg'r 341, - -	201,	1,	1876.
McLeod *a.* Napier, 9 Wend 120, - - - - -	187,	1,	1832.
McLewee *a.* Hall, 103 N. Y. 639, - - - - -	64,	2,	1886.
McMahon *v.* O'Donnel, 5 C. E. Gr. 306, - - - -	60,	1,	1869.
McManus *a.* Tracy, 58 N. Y. 257, - - - - -	48, 67,	3, *c*, 13,	1874.
McNair *a.* Cumpston, 1 Wend. 457, - - - - -	7, 54,	4, 1,	1828.
McNaughten *v.* Partridge, 11 Ohio 223, - - - -	135,	1, *a*,	1842.
McNaughton's Appeal, 12 W. N. 540, 5 Out. 550, - - - -	19,	4,	1882.
McStea *v.* Matthews, 50 N. Y. 166, - - - - -	17,	3,	1872.
Mead *a.* Mahagan, 63 N. H. 130, - - - - -	10,	11,	1884.
Mears *a.* Helsby, 5 B. & C. 504, - - - - - -	144,	2,	1826.
Meason *v.* Kaine, 13 Sm. 335, - - - - - -	10, 121,	6, 1,	1869.
Mechanics' Bank *v.* Goodwin, 1 Hal. Ch. 334, - -	112,	12,	1846.
Mecutchen *v.* Kennady, 3 Dutch 230, - - - -	126,	6,	1858.
Medera *a.* Sheridan, 2 Stock. 469, E. & A. - -	57, 66,	4, 4,	1855.

Meech *v.* Allen, 17 N. Y. 300,	193,	2,	1858.
Meehan *v.* Valentine, 29 Fed. Rep'r 276,	59,	3,	1886.
Meigs *a.* Billings, 53 Barb. 272,	130,	7,	1869.
Meily *v.* Wood, 21 Sm. 488,	109.	7,	1872.
Meyer *a.* Elgin Watch Co., 30 Fed. Rep'r 659,	131,	1,	1887.
Menagh *v.* Whitwell, 52 N. Y. 146,	103, 106, 107. 167,	4, 1, *b*, 4, 7, *a*,	1873.
Meng *a.* Pleasants, 1 Dall. 380,	132,	3,	1788.
Merandà *a.* Rogers, 7 O. St. 179,	197,	3,	1857.
Merrick *v.* Gordon, 20 N. Y. 93,	62,	*e*,	1859.
Merrill *v.* Green, 55 N. Y. 270,	148,	3,	1873.
Merritt *v.* Walsh, 5 Tiffany 685,	67,	3,	1865.
Mershon *v.* Hobensack, 2 Zab. 372,	69,	10,	1850.
Merwin *v.* Playford, 3 Rob. 702,	59,	*k*,	1865.
Metropolis Nat. Bank *v.* Sprague, 5 C. E. Gr. 13,	194,	4,	1869.
Meyer *v.* Sharpe, 5 Taunt. 74,	27,	4,	1813.
Meyer *a.* Styles, 7 Lans. 190,	69,	9,	1872.
Meylert *a.* Evans, 7 Harris 402,	119,	*b*,	1862.
Mifflin *v.* Smith, 17 S. & R. 165,	76,	18,	1827.
Miles *a.* Strong, 45 Conn. 52,	167,	5, *d*.	1877.
Miles *v.* Wenn, 27 Minn. 56,	91,	2,	1880.
Miller *v.* Brigham, 50 Cal. 615,	103, 104,	5, 8,	1875.
Miller *v.* Consolidation Bank, 12 Wr. 514,	127,	5,	1865.
Miller *a.* Dungan, 4 C. E. Gr. 219,	130,	7, *b*.	1868.
Miller *a.* Gale, 54 N. Y. 536,	171,	4,	1874.
Miller *a.* Jackson, 1 Dutch. 90,	138,	2,	1855.
Miller *a.* Johnson, 16 Ohio 431,	67,	11,	1847.
Miller *v.* Marx, 65 Texas 131,	58,	*g*,	1885.
Miller *v.* Reed, 3 Casey 244,	63, 91,	6, 1,	1856.
Miller *v.* Sims, 2 Hill 479,	136,	1,	1834.
Millers *a.* Wynne, 61 Geo. 345,	103,	12,	1878.
Millett *v.* Stringer, 17 Abb. Pr. 152,	41,	2,	1858.
Mills *a.* Clarke, 13 P. Rep'r 569,	158,	4,	1887.
Mills *a.* Cummings, 1 Daly 520,	61,	3,	1866.
Mitchell *a.* Palmer, 2 Mylne & K. 655,	43,	1,	1834.
Mitchell *a.* Rammelsberger, 29 O. St. 22,	212,	1,	1875.
Mittnight *v.* Smith, 2 C. E. Gr. 259,	106,	5, *c*,	1865.
Mize *a.* Westbrook, 10 P. Rep'r 881,	47,	1,	1886.
Mohawk & H. R. R. *v.* Niles, 3 Hill 162,	62,	*e*,	1842.
Moies *v.* O'Neill, 8 C. E. Gr. 207,	180,	1,	1873.
Moist's Appeal, 24 Sm. 166,	88,	3,	1873.
Moley *v.* Brine, 120 Mass. 324,	31,	6,	1876.
Mollwo *v.* Court of Wards, L. R. 4 P. C. 419,	64,	*b*,	1872.
Monroe *a.* Ferson, 1 Foster, 462,	106, 107, 194,	1, *c*, 4, 3,	1850.
Monteith *a.* Bank, 1 Denio 402,	44,	8,	1845.
Moore *v.* Davis, 11 Ch. D. 261,	45,		1879.
Moore *v.* Gano, 12 Ohio 300,	158,	2,	1843.
Moore *v.* Hepburn, 5 Barr 399,	83,	4, 1,	1847.

Moore *v.* Huntingdon, 7 Hun 425,	67,	11,	1876.
Moore *a.* Sloan, 1 Wright 217,	114, 131, 173,	1, 1, 4,	1860.
Moorehead *v.* Gilmore, 27 Sm. 118,	127,	7,	1874.
Moore's Appeal, 10 Cssey 411,	88,	3,	1859.
More *a.* Hollemback, 44 N. Y. Sup'r Ct. 107,	41,	2,	1878.
Morgan *a.* Alexander, 31 O. St. 546,	138,	3,	1877.
Morgan *v.* Schuyler, 79 N. Y. 490,	209,	1, *a*,	1879.
Morganstern *v.* Thrift, 66 Cal. 577,	47,	3,	1885.
Moriarty *v.* Bailey, 46 Conn. 592,	167,	5, *a*,	1879.
Morrell *a.* Randell, 2 C. E. Gr. 343,	173,	10,	1866.
Morrell *a.* Ryan, 21 Reporter, Ky., 273,	40,	4.	1885.
Morris *v.* Allen, 1 McCart. Ch. 44,	165,	4,	1861.
Morris *a.* Cummings, 25 N. Y. 625,	156,	5,	1862.
Morris *a.* Davis, 36 N. Y. 569,	77,	*e*,	1883.
Morriset v. King, 2 Bur. 891,	66,	1,	1759.
Morrison *v.* Atwell, 9 Bosw. 503,	170,	2,	1862.
Morrison *a.* Sweet, 7 E. Rep'r 389,	206,	2,	1886.
Morse *a.* Page, 128 Mass. 99,	136,	4, *c*,	1880.
Morse *v.* Wilson, 4 Term. 353,	66,	5,	1791.
Mortimer *a.* Noble, 4 W. N. C. 300,	121,	10,	1877.
Morton *a.* Pulford, 28 N. W. R. 716,	10,	5,	1886.
Moses *v.* Halfield, 3 S. E. Rep'r 538,	117,	1,	1887.
Mosgrove *v.* Golden, 5 Out. 605,	76,	3,	1882.
Mudgett *a.* Bank of Commonwealth, 44 N. Y. 514,	126,	4,	1871.
Muir *v.* City of Glasgow Bank, 4 H. L. 337,	73,	2,	1879.
Muir *a.* Parkhurst, 3 Hal. Ch. 307, 3 Hal Ch. 555,	180,	2,	1848. 1849.
Muir *a.* Tellers, Pen. 749,	121,	4,	1811.
Mulock *a.* Smith, 1 Rob. 569,	178,	4.	1863.
Mumford *v.* Nicholl, 20 Johns 611,	67,	1,	1822.
Munro *a.* Whitman, 8 Hun 553,	32, 57,	2, 4,	1876.
Munson *a.* Ford, 1 South. 93,	76,	5,	1818.
Munster *v.* Cox, 10 App. Cas. 680,	77,	3,	1885.
Murdock *a.* Frazer, 6 H. L. 855,	74,	8,	1881.
Murphy *a.* Tait, 2 S. Rep'r 317,	100,	*b*,	1887.
Murray *v.* Bogert, 14 Johns. 318,	171, 206,	2, 2,	1817.
Murray *v.* Elston, 8 C. E. Gr. 127, 9 C. E. Gr. 310, 589,	212, 215,	8, 3,	1872. 1873.
Murray *a.* Fisher, 1 E. D. Sm. 341,	131,	3,	1850.
Murray *a.* Harris, 28 N. Y. 574,	37, 104,	*f*, 7,	1864.
Murray, in re, 13 Fed. Rep'r 550,	69,	22,	1882.
Murray *a.* Watson, 8 C. E. Gr. 257,	211,	2.	1872.
Murrell *v.* Murrell, 33 La. 1233,	112,	2,	1881.
Mutrie *a.* Binney, 12 Appeal Cases 186,	31,	2,	1886.
Muzzey *a.* Brundred, 1 Dutch. 268,	59,	*l*, *p*,	1855.
Muzzy *v.* Whitney, 10 Johns. 226,	59,	*d*,	1813,
Myers *a.* Avery, 60 Miss. 368,	75,	2,	1882.
Myers *v.* Nell, 4 W. N. 229,	94,	2,	1877.
Myers *v.* Smith, 29 Ohio St. 120,	216,	2,	1876.
Myler *a.* Smith, 10 Harris 36,	130,	1, 9,	1853.
Myley *a.* Bank of Lancaster, 1 Harris 544,	109,	7,	1850.

Table of Cases.

Case	Page	Note	Year
Nanson *v.* Gordon, L. R. 1 App. Cas. 195,	204,	1,	1876.
Napier *v.* McLeod, 9 Wend. 120,	187,	1,	1832.
Nash *a.* Nixon, 12 O. St. 647,	100,	*d*,	1861.
National Bank of Salem *v.* Thomas, 47 N. Y. 15,	128,	3,	1871.
Neff, in re, 19 Q. B. D. 88,	138, 201,	1, 2,	1887.
Negley *a.* Ihmsen, 1 Casey 297,	126,	3,	1855.
Nell *a.* Myers, 4 W. N. 229,	94,	2,	1877.
Nelson *a.* Tomlinson, 49 Wis. 679,	156,	3,	1880.
Nesham *a.* Barry, 3 C. B. 641,	58,	*c*,	1841.
Newberry *a.* Cheney, 67 Cal. 126,	76,	17,	1885.
Newbold *v.* Wright, 4 Rawle 205,	4,	1,	1833.
Newcomet *v.* Brotzman, 19 Sm. 185,	177,	1,	1871.
Newkirk *a.* Davis, 5 Denio 92,	122,	7,	1847.
Newman *a.* Bell, 5 S. & R. 78,	105, 108, 195,	1, 7, 4,	1819.
Newman *v.* Richardson, 9 Fed. Rep'r 865,	125,	4,	1881.
Newsome *v.* Coles, 2 Camp. 617,	176,	2, *a*,	1811.
New York & H. R. R. *a.* Straiton, 2 E. D. Sm. 184,	62,	*e*,	1853.
New York Mut. Life *a.* Cohen, 50 N. Y. 611,	16,	2,	1872.
Nicholl *a.* Mumford, 20 Johns. 611,	67,	1,	1822.
Nichols *v.* White, 15 N. Y. 531,	178,	3,	1881.
Nicholson *v.* Leavitt, 4 Sandf. 252,	170,	1,	1850.
Niles *a.* Mohawk & H. R. R., 3 Hill 162,	62,	*e*,	1842.
Nisbet *v.* Patton, 4 Rawle 120,	139,	1,	1833.
Nixon *v.* Nash, 12 O. St. 647,	100,	*d*,	1861.
Noakes *v.* Barlow, 20 W. R. 388; 26 L. T. 136,	11,	1,	1872.
Noakes *v.* Smith, 1 Yeates 238,	112,	15,	1793.
Noble *v.* Mortimer, 4 W. N. C. 300,	121,	10,	1877.
Noland *v.* Oblius, 13 Petersdorf 106; 1 Stark 272,	62,	*f*,	1816.
Norcross *a.* Brewer, 2 C. E. Gr. 219,	214,	2,	1865.
Norris *a.* Bank, 43 L. I. 56,	68,	2,	1886.
North *v.* Bloss, 30 N. Y. 374,	76,	12,	1864.
Noyes *a.* Denton, 6 Johns. 295,	119,	*c*,	1810.
Oblius *a.* Noland, 13 Petersdorf 106; 1 Stark 272,	62,	*f*,	1816.
O'Donnell *a.* McMahon, 5 C. E Gr. 306.	60,	1,	1869.
Ogden *v.* Astor, 4 Sandf. 311,	54,	1,	1850.
Oliphant *v.* Matthews, 16 Barb. 608,	76,	20,	1853.
Oliver *v.* Forrester, 96 Ill. 315,	173,	1,	1880.
Onderdonk *a.* Hutchinson, 2 Hal. Ch. 277,	188,	2,	1847.
Onderdonk *v.* Hutchinson, 2 Hal. Ch. 632, E. & A.	188,	2,	1849.
O'Neill *a.* Moies, 8 C. E. Gr. 207,	180,	1,	1873.
Oram *v.* Rothermel, 2 Out. 300,	87,	3,	1881.
Orr *v.* Ferrell, 5 S. W. Rep'r 490,	132,	1,	1887.
Orr *a.* Lee, 11 Pac. R. 745,	76,	1,	1886.
Orsee *a.* Smith, 42 N. Y. 132,	104,	4,	1870.
Orser *a.* Pettee, 6 Bosw. 123,	131,	1,	1860.
Osborne *v.* Barge, 29 Fed. Rep'r 725,	131,	4,	1887.
Osburn *v.* Farr, 42 Mich. 134,	76,	8,	1879.
Otis *v.* Sill, 8 Barb. 102,	112,	19,	1849.
Ouachita Belle *a.* Wilmont, 23 La. An. 607,	122,	5,	1880.
Owen *v.* Body, 5 A. & E. 28,	59,	*o*,	1836.
Owens *v.* Mackall, 33 Md. 372,	72,	2,	1870.
Oxley *a.* Tucker, 5 Cranch 34,	105,	2,	1809.

Table of Cases.

Paddock *a.* Topping, 92 Ill. 92,	20,	3,	1879.
Page *v.* Frye, 2 B. & P. 240,	103,	11,	1800.
Page *v.* Morse, 128 Mass. 99,	136,	4, *c*,	1880.
Page *v.* Thomas, 43 O. St. 38,	111,	10,	1885.
Paige *v.* Paige, 32 N. W. Rep'r 360,	112,	14,	1887.
Palmer *v.* Mitchell, 2 Mylne & K. 655,	43,	1,	1834.
Palmer *v.* Purdy, 83 N. Y. 144,	149,	3,	1880.
Palmer *v.* Stephens, 1 Denio 471,	131,	3, *a*,	1845.
Pardee *v.* Markle, 17 W. N. C. 211,	151,	1,	1886.
Parke *v.* Smith, 4 W. & S. 290,	117,	*a*,	1842.
Parker *a.* Barker, 1 T. R. 287,	71,	1,	1786.
Parker *v.* Canfield, 37 Conn. 251,	60,	2,	1870.
Parker, in re, 19 Q. B. D. 84,	47,	3,	1887.
Parkhurst *v.* Muir, { 3 Hal. Ch. 307, / 3 Hal. Ch. 555,	180,	2,	1848. / 1849.
Parkins *a.* Ross, L. R. 20 Eq. 331,	59,	*c*,	1875.
Parks *a.* Manville, 7 Cal. 128,	51,	2,	1883.
Parmalee *v.* Wiggenhorn, 6 Neb. 322,	144,	1,	1877.
Parsons *v.* Crosby, 5 Esp. 199,	48,	2,	1805.
Parsons *v.* Hayward, 4 DeG. F. & J. 474,	207,	3,	1862.
Partridge *a.* Mason, 66 N. Y. 633,	134,	5,	1876.
Partridge *a.* McNaughten, 11 Ohio 223,	135,	1, *a*,	1842.
Partridge *v.* Wells, 3 Stew. 176,	110,	2,	1878.
Paschal *a.* Slade, 67 Geo. 541,	69,	16,	1881.
Patterson *v.* Arnold, 9 Wr. 410,	24,	4,	1863.
Patterson *v.* Brewster, 4 Edw. Ch. 352,	8,	1,	1844.
Patterson *v.* Burton, Pen. 717,	155,	1,	1810.
Pattison *v.* Blanchard, 5 N. Y. 186,	62,	*e*,	1851.
Patton *a.* Heustis, 2 Dutch. 293,	12,	1,	1857.
Patton *a.* Nisbet, 4 Rawle 120,	139,	1,	1833.
Pautz *a.* Gauger, 45 Wis. 449,	96,	2,	1878.
Payne *v.* Freer, 91 N. Y. 43,	165,	2,	1883.
Peabody *a.* Harris, 73 Me. 262,	193,	1,	1881.
Peacock *v.* Cummings, 10 Wr. 434,	152,	2,	1864.
Pearce *a.* Renfrow, 68 Ill. 125,	197,	2,	1878.
Pearce *a.* Struthers, 51 N. Y. 359, 365,	212,	9,	1873.
Pearce *a.* Wilkins, 5 Denio 541,	133,	1,	1848.
Pease *v.* Cole, 53 Conn. 53,	14,	1,	1885.
Peck *v.* Leavitt, 2 Conn. 124,	152,	1,	1819.
Peck *a.* Sayre, 1 Barb. 464,	215,	3,	1847.
Pell *a.* Bloxam, 2 Wm. Bl. 999,	66,	2,	1775.
Peltier *v.* Sewall, 12 Wend. 386,	67,	9,	1834.
Penn *v.* Whitehead, 17 Gratt. 503,	138,	4,	1867.
Penn'a R. R. Co. *v.* St. Louis, A. & T. R. R, 118 U. S. 290,	24,	7,	1886.
Penrhyn Slate Co. *a.* Cook, 36 O. St. 135,	176,	2, *a*,	1880.
Pennrick *a.* Thomas, 28 O. St. 55,	167,	4, *b*,	1878.
Pepple *a.* Roberts, 55 Mich. 367,	91,	2,	1884.
Perceval *a.* Fuller, 126 Mass. 381,	125,	6,	1879.
Percy *a.* Fairland, 3 P. & M. 217,	{ 74, / 141,	11, / 1,	1875.
Percy *a.* Smith, 5 Dutch. 74,	27,	2,	1860.
Perkenpine *a.* Elton, 1 E. Rep'r 637,	150,	2,	1855.
Perkins *v.* Fisher, 80 Ky. 11,	164,	1,	1882.
Perrine *a.* Cowart, 3 C. E. Gr. 457,	213,	1,	1867.
Perrine *v.* Hankinson, 6 Hal. 181,	12,	1,	1829.
Perring *v.* Hone, 4 Bing. { 28, / 20,	153, / 160,	2, / 1,	1826.

Table of Cases.

Perry *a.* Bardwell, 19 Vt. 292,	108, 195,	6, 2,	1847.
Perry *a.* Roach, 16 Ill. 37,	36,	6,	1854.
Peters *a.* Cox, 2 Beas. 39,	180,	1,	1860.
Peterson *a.* Guillou, 8 Nor. 163,	41,	1,	1879.
Peterson *a.* Guillou, 31 Leg. Int. 112,	139,	5,	1874.
Peterson *v.* Roach, 32 Ohio St. 374,	128,	1,	1877.
Petit *v.* Chevalier, 2 Beas. 181,	173,	7, *a*,	1860.
Petry's Appeal, 11 W. N. 512,	184,	1,	1882.
Pettee *v.* Orser, 6 Bosw. 123,	131,	1,	1860.
Pettingill *v.* Jones, 28 Kan. 749,	158,	3,	1882.
Phelan *a.* Collender, 79 N. Y. 366,	210,	3,	1879.
Phelps *a.* Filley, 18 Conn. 294,	147,	3,	1847.
Phillips *a.* Hutzler, 1 S. E. Rep'r 502,	108,	5,	1887.
Phillips *v.* Reeder, 3 C. E. Gr. 95,	212,	6,	1866.
Pilcher, Succession of, 1 S. Rep'r, La., 929,	103,	*c*,	1887.
Pilgrem v. Pilgrem, 18 Ch. D, 93,	74,	9,	1881.
Pilley *v.* Robinson, 20 Q. B. D. 155,	77,	3,	1887.
Pittard *a.* Bond, 3 M. & W. 357,	48,	3, *b*,	1838.
Place *v.* Sweetzer, 10 Ohio 142,	100, 103,	*d*, 5,	1847.
Playford *a.* Merwin, 3 Rob. 702,	59,	*k*,	1865.
Pleasants *v.* Meng, 1 Dall. 380,	132,	3,	1788.
Plumer *v.* Gregory, L. R. 18 Eq. 621,	140,	1,	1874.
Plunkett *v.* Dillon, 4 Houston 338,	57,	4,	1875.
Pole *v.* Leask, 9 Jurist, N. S., 829,	69,	9,	1863.
Pollard *a.* Anderson, 62 Geo. 46,	86,	6,	1878.
Pollion *v.* Secor, 61 N. Y. 456,	69,	1,	1875.
Pond *v.* Cummins, 50 Conn. 372,	59,	*b*,	1882.
Pooley *v.* Driver, 5 Ch. D. 458,	50, 64,	3, 1,	1876.
Pope *a.* Alderson, 1 Camp. 404, n.	134,	3,	1811.
Pope *v.* Cole, 55 N. Y. 124,	86,	5,	1873.
Pope *a.* James, 19 N. Y. 324,	176,	1,	1859.
Poppenhauser *a.* Riper, 43 N. Y. 68,	37,	3, *g*,	1870.
Poppenhusen *a.* Richter, 39 How. Pr. 82,	72,	2,	1870.
Porter *a.* Critchfield, 3 Ohio 519,	119,	*a*,	1828.
Porter *v.* McClure, 15 Wend. 187,	7, 44,	2, 4,	1836.
Porter *a.* Whitman, 107 Mass. 522,	31,	5,	1871.
Porteus *a.* Benjamin, 2 H. Bl. 590,	63,	2,	1796.
Pott *v.* Eyton, 3 C. B. 32,	63,	1,	1846.
Potter *v.* Magee, Pamphlet U. S. C. C. 21,	106, 107, 108,	5, *d*, 1, 2,	1878.
Potter *v.* McCoy, 2 Casey 458,	135,	2,	1856.
Potter *a.* Northern Insurance Co., 63 Cal. 157,	90,	3,	1883.
Powers *a.* Purdy, 6 Barr. 492,	167,	4, *a*,	1847.
Prentice *v.* Elliott, 72 Geo. 154,	213,	2,	1883.
Presby *a.* Dunham, 120 Mass. 285,	211,	2,	1876.
Price *v.* Groom, 2 Exch. 542,	59,	*n*,	1848.
Price *v.* Spencer, 7 Phila. 179, 40 L. I. 76,	161,	2,	1870. 1873.
Prichard *a.* Cooper, 75 L. T. 91,	140,	3,	1883.
Princeton & K. Turnpike Co. *v.* Gulick, 1 Harr. 161,	177,	4,	1837.
Pringle *v.* Leverick, 97 N. Y. 181,	146,	3,	1884.
Procter *a.* Lord, 7 Phila. 630,	64,	*c*,	1870.

Prosser *v.* Hartley, 29 N. W. Rep'r 156,	103,	*c*,	1886.
Prouty *v.* Swift, 51 N. Y. 594,	59,	*i*,	1873.
Pruyn *v.* Black, 21 N. Y. 300,	94,	*c*,	1860.
Pugh *a.* Andrews, 24 L. J. Ch. 58,	59,	*g*,	1855.
Pulford *v.* Morton, 28 N. W. R. 716,	10,	5,	1886.
Purdy *a.* Palmer, 83 N. Y. 144,	149,	3,	1860.
Purdy *v.* Powers, 6 Barr. 492,	167,	4, *a*,	1847.
Purvis *a.* Hamill, 2 P. & W. 177,	129,	3,	1830.
Putnam *v.* Wise, 1 Hill 234,	12,	1,	1841.
Queen *v.* Robson, 16 Q. B. 137,	16,	1,	1885.
Quin *v.* Davis, 28 Sm. 15,	4,	2,	1875.
Quinn *a.* Stamets, 11 C. E. Gr. 383,	201,	3,	1876.
Radenhurst *v.* Bates, 11 Moore 421; 3 Bing. 463,	76,	6,	1826.
Rafferty *a.* Todd, 3 Stew. 254,	212,	7,	1878.
Raiguel's Appeal, 30 Smith 234,	161, 162,	3, 1, *a*,	1876.
Raiguel *a.* Wentworth, 9 Phila, 275,	162,	1, *a*,	1873.
Railroad Co. *v.* Bixby, 55 Vt. 235,	104,	3,	1882.
Railroad Co., Pa., *v.* Duncan, 1 Am. 352,	24,	10,	1886.
Ralph *v.* Lockwood, 61 Cal. 155,	76,	17,	1882.
Rammelsberger *v.* Mitchell, 29 O. St. 22,	212,	1,	1875.
Ramsdale *a.* Beckett, 31 Ch. D. 177,	88,	8,	1855.
Randell *v.* Morrell, 2 C. E. Gr. 343,	173,	10,	1866.
Randolph *v.* Daly, 1 C. E. Gr. 313,	105, 193,	2, 3,	1863.
Randolph *a.* Shafer, 3 Out. 250,	69,	2,	1881.
Rankin *v.* Blackwell, 3 Hal. Ch. 152,	106, 192,	5, *e*, 2,	1848.
Rapier *v.* Gulf City Paper Co., 64 Ala. 330,	25,	1,	1877.
Rappleyea *a.* Dunham, 1 Harr. 75,	157,	3,	1837.
Ratcliff *a.* McKnight, 8 Wr. 156,	142,	1,	1863.
Rathman *a.* Bitter, 61 N. Y. 512,	69, 106, 138,	19, 4, *a*, 1,	1870.
Ratzer *v.* Ratzer, 1 Stew. 137,	3,	2,	1877.
Raub *v.* Smith, 28 N. W. R. 676,	10,	5,	1866.
Ravenscroft *a.* Heathcot, 2 Hal. Ch. 113,	181,	1,	1847.
Rawlinson *v.* Clarke, 15 M. & W. 292,	59,	*h*,	1846.
Raymond *a.* Harper, 3 Bosw. 29,	171,	5,	1858.
Read *v.* Bailey, L. R. 3 App. Cas. 94,	197, 202, 205,	2, 1, 1, 2, 4,	1877.
Read *a.* Collumb, 24 N. Y. 505,	109,	6,	1862.
Reade *v.* Bentley, 4 Kay & J. 657,	48,	3, *b*,	1858.
Rector *a.* Higgins, 47 Texas 361,	193,	1,	1877.
Reed *a.* Fletcher, 125 Mass. 312,	184,	3,	1881.
Reed *v.* Hollingshead, 8 B. & C. 878,	52,		1825.
Reed *v.* Kremer, 1 Am. 482,	69,	5,	1886.
Reed *a.* Miller, 3 Casey 244,	63, 91,	6, 1,	1856.
Reeder *a.* Phillips, 3 C. E. Gr. 95,	212,	6,	1866.

TABLE OF CASES.

Reeves *v.* Goff, Pen. 609,	158,	1,	1809.
Reg. *v.* Wortley, 15 Jurist 1137,	59,	*k*,	1851.
Reid, Ex parte, 2 Rose 84,	198,	1, *a*,	1814.
Reid *v.* Gardiner, 65 N. Y. 578,	214,	1,	1875.
Reis *v.* Hellman, 25 O. St. 180,	166,	1, *a*,	1874.
Remel *v.* Hayes, 83 Mo. 200,	69,	16,	1884.
Remington *a.* Edwards, 51 Wis. 336,	96,	2,	1881.
Renfrow *v.* Pearce, 68 Ill. 125,	197,	2,	1878.
Rensheimer *v.* Hemingsway, 11 Casey 432,	104,	6,	1860.
Renton *v.* Chaplain, 1 Stock. 62,	181,	2,	1852.
Reppert *v.* Colvin, 12 Wr. 248,	178,	1,	1864.
Reuben *v.* Cohen, 48 Cal. 545,	168,	2,	1874.
Reynolds *v.* Cleveland, 4 Cowen 282,	11,	2,	1825.
Reynolds *a.* Cole, 18 N. Y. 74,	161,	7,	1858.
Reynolds *v.* Howell, L. R. 8 Q. B. 398,	119,	1,	1873.
Reynolds *a.* Stidger, 19 Ohio 351,	207,	4,	1841.
Rhyne *a.* Love, 86 No. Car. 572,	156,	1,	1882.
Rianhard *v.* Hovey, 13 Ohio 300,	24,	2,	1844.
Rice *v.* Shute, 5 Burr. 2611,	80,	1,	1770.
Rice *a.* Wheat, 97 N. Y. 296,	144,	6,	1884.
Rich *v.* Hasson, 4 Sandf. 115,	121,	13,	1850.
Richards *v.* Allen, 44 Leg. Int. 432,	113,	6,	1887.
Richards *v.* Grinnell, 63 Iowa 44,	51,	1,	1884.
Richardson *v.* Hughitt, 76 N. Y. 55,	66,	6,	1879.
Richardson *a.* Newman, 9 Fed. Rep'r 865,	125,	4,	1881.
Richter *v.* Poppenhusen, 39 How. Pr. 82,	72,	2,	1870.
Rickard *a.* Jennings, 15 Pac. Rep'r 677,	151,	2,	1887.
Ricker *v.* Am. Loan & Tr. Co., 140 Mass. 346,	16,	6,	1885.
Riegle *v.* Irwin, 34 Leg. Int. 447,	129,	1,	1877.
Riessner *a.* Rogers, 30 Fed. Rep'r 525,	144,	3,	1887.
Riley *a.* Hood, 3 Gr. 127,	{ 130, 131,	10, 3, *b*,	1835.
Ringo *v.* Wing, 5 S. W. Rep'r 787,	171,	1,	1887.
Riper *v.* Poppenhausen, 43 N. Y. 68,	37,	3, *g*,	1870.
Rizer *v.* James, 26 Kan. 221,	69,	16,	1881.
Roach *v.* Perry, 16 Ill. 37,	36,	6,	1854.
Roach *a.* Peterson, 32, O. St. 374,	128,	1,	1877.
Robbins *v.* McKnight, 1 Hal. Ch. 645, E. & A.	{ 51, 67,	1, 9,	1847.
Roberts Appeal, 11 N. 407, O. C. 13 Phil. 36,	{ 24, 135,	8, 3, *a*,	1880.
Roberts *v.* Eberhardt, 1 Kay 148,	15,	3,	1853.
Roberts *v.* Eldred, 15 P. Rep'r 16,	112,	7,	1887.
Roberts *v.* Law, 4 Sandf. 642,	210,	1,	1851.
Roberts *v.* Pepple, 55 Mich. 367,	91,	2,	1884.
Roberts *a.* Ruppell, 4 N. & M. 31,	50,	3, *a*,	1834.
Roberts *a.* Tench, 6 Madd. Ch. 145,	211,	2,	1819.
Robertson *a.* Saville, 4 Term. 720.	19,	1,	1792.
Robertson *v.* Smith, 18 Johns. 459,	84,	1,	1821.
Robinett's Appeal, 12 Casey 174,	42,	3,	1860.
Robins *v.* Taswell, 27 Ill. 365,	25,	6,	1862.
Robinson *v.* Ashton, 20 Eq. 25,	28,	2,	1873.
Robinson *v.* McIntosh, 3 E. D. Sm. 221,	207,	1,	1854.
Robinson *a.* Pilley, 20 Q. B. D. 155,	77,	3,	1887.
Robson *v.* Eaton, 1 T. R. 62,	119,	1,	1785.
Robson *a.* Guidan, 2 Camp. 302,	69,	21,	1809.
Robson *a.* Queen, 16 Q. B. 137,	16,	1,	1885.

Table of Cases.

Rockwell *a.* Higgins, 2 Duer. 650,	87,	2,		1853.
Rogers *a.* Dunham, 1 Barr. 255,	7, 60,	1, 1,		1845.
Rogers *v.* Meranda, 7 O. St. 179,	197,	3,		1857.
Rogers *v.* Riessner, 50 Fed. Rep'r 525,	144,	3,		1887.
Rogers *v.* Rogers, 5 Ire. Eq. 31,	162,	2,		1847.
Rogers *a.* Roop, 5 Watts 193,	106,	8,	*b*,	1836.
Rogers *v.* Suttle, 19 Bradwell 163,	69,	17,		1885.
Romero *v.* Dalton, 11 Pac. R. 863,	12,	1,		1886.
Roop *v.* Rogers, 5 Watts 193,	106,	8,	*b*,	1836.
Root *v.* Delaney, 99 Mass. 546,	12,	1,		1868.
Rorbach *a.* Vansyckle, 2 Hal. Ch. 234,	137,	1,		1847.
Rose *v.* Hayden, 35 Rand. 106,	10,	9,		1886.
Rosenfield *v.* Haight, 53 Wis. 260,	52,			1881.
Ross *v.* Howell, 3 Nor. 129,	95, 122,	 4,	*d*,	1877.
Ross *a.* Linn, 1 Harr. 55,	140,	2,		1837.
Ross *v.* Parkins, L. R. 20, Eq. 331,	59,		*c*,	1875.
Ross *v.* West, 2 Bosw. 390,	117,	3,		1858.
Rothell *v* Grimes, 35 N. W. 392,	192,	1,	*a*,	1887.
Rothermel *a.* Oram, 2 Out. 300,	87,	3,		1881.
Rowe *a.* Fuller, 57 N. Y. 23,	24,	1,		1874.
Rowland *a.* Burns, 40 Barb. 368,	69,	18,		1863.
Royce *a.* Sanborn, 132 Mass. 594,	103,	5,		1882.
Ruggles *a.* Shamburg, 2 Nor. 148,	70,	2,		1876.
Runyon *v.* Brokam, 1 Hal. Ch. 340,	215,	3,		1846.
Ruppell *v.* Roberts, 4 N. & M. 31,	50,	3,	*a*,	1834.
Rusher *a.* Wade, 4 Bosw. 537,	140, 166,	3, 3,	 *a*,	1859.
Russell *v.* Austwick, 1 Sim. Ch. 52,	151,	4,		1826.
Russell *a.* Mallory, 32 N. W. Rep'r 102,	112,	14,		1887.
Russell *a.* Marsh, 66 N. Y. 288,	211,	2,		1876.
Russell *v.* Russell, 14 Ch. D. 471,	215,	2,		1880.
Russell *a.* Scruggs, McCahon 39, U. S. C. C.	10,	2,		1858.
Russell *v.* Stroud, 12 W. N. 419,	103,	1,		1882.
Ruth *v.* Lowrey, 10 Neb. 260,	76,	1,		1880.
Ryan *a.* Donnally, 5 Wr. 306,	38,	1,		1861.
Ryan *v.* Morrell, 21 Reporter 273, Ky.	40,	4,		1885.
Ryder *v.* Gilbert, 16 Hun 163,	25,	4,		1878.
Sage *v.* Sherman, 2 N. Y. 417,	8,	2,		1849.
Sager *v.* Tupper, 38 Mich. 258,	44,	2,		1878.
Salmon *v.* Davis, 4 Binn. 375,	117,		*a*,	1812.
Salt Lake City *v.* Hollister, 118 U. S. 256,	24,	7,		1886.
Samuel *a.* Gano, 14 Ohio 593,	124,	4,		1846.
Sanborn *v.* Dwinell, 135 Mass. 236,	205,	4,		1883.
Sanborn *v.* Royce, 132 Mass. 594,	103,	5,		1882.
Sands *a.* Blaker, 29 Kan. 551,	14,	1,		1883.
Sargeant *a.* Tibbals, 1 McCart. 449,	182,	1,		1862.
Sarria *a.* King, 69 N. Y. 24,	37,	3,	*a*,	1877.
St. Louis, Alton & T. H. R. R. Co. *a* Pa. R. R., 118 U. S. 290,	24,	7,		1886.
Savage, in re, 16 Nat Bank'cy Rep'r 368,	164,	4,		1878.
Saville *v.* Robertson, 4 Term. 720,	19,	1,		1792.
Sawyer *a.* Bank, 38 O. S. 339,	19,	3,		1882.
Sayre *v.* Frick, 7 W. & S. 383,	6,	2,		1844.

Table of Cases.

Sayre *v.* Peck, 1 Barb. 464,	215,	3,	1847.
Scarf *v.* Jardine, 7 App. Cas. 345,	70,	1,	1882.
Sceva *v.* True, 53 N. H. 632,	46,	1,	1873.
Schaeffer *v.* Fowler, 1 Am. 451, Pa.,	49,	1,	1886.
Schenkle *v.* Dana, 118 Mass. 237,	188,	3,	1875.
Schlieper *a.* Wetter, 4 E. D. Smith 707,	131,	1,	1858.
Schmertz *v.* Shreeve, 12 Sm. 457,	118,	*b*,	1869.
Schneck a. Seely, Pen. 75,	76,	2,	1806.
Schoolly *a.* Mfg. & M. Co. of Sandusky, Tappan 233,	76,	7,	1818.
Schriver *v.* Cobeau, 4 Watts 130,	57,	4,	1835,
Schulten *v.* Lord, 4 E. D. Smith 206,	76,	14,	1855.
Schuyler *a.* Morgan, 79 N. Y. 490,	209,	1, *a*,	1879.
Schwamb *a.* Taft, 80 Ill. 289,	32,	3,	1875.
Scoles *a.* Wood, L. R. 1 Ch. 369,	35, 208,	1, 1,	1866.
Scott *v.* Guthrie, 10 Bosw. 408,	170,	3,	1863.
Scott *a.* Nat. Ins. Co., 1 Johns. 106,	49,	6, *a*,	1806.
Scruggs *v.* Russell, McCahon 39, U. S. C. C.,	10,	2,	1858.
Scull *v.* Alter, 1 Harr. 147,	170,	4,	1837.
Seabrook *a.* Stout, 3 Stew. 187,	213,	3,	1878.
Sears *a.* Manhattan Brass & Mfg. Co., 45 N. Y. 797,	51,	1,	1871.
Seavers *a.* Long, 7 Out. 517,	12,	1,	1883.
Sebor *a.* Lawrenee, 2 Caines 505,	103,	10,	1804.
Secor *v.* Keller, 4 Duer 414,	76,	13,	1855.
Secor *a.* Pollion, 61 N. Y. 456,	69,	1,	1875.
Seely v. Schneck, Pen. 75,	76,	2,	1806.
Seelye *v.* Taylor, 32 La. An. 1115,	30,	1,	1880.
Seguin's Appeal, 7 Out. 139,	42,	3,	1883.
Seibold *a.* Gay, 97 N. Y. 472,	76,	15,	1884.
Seighortner *v.* Weissenborn, 5 C. E. Gr. 172,	173,	9,	1869.
Seipt *a.* Black, 7 W. N. 565; 34 L. I. 66,	9,	1,	1879.
Semple *a.* Uhler, 5 C. E. Gr. 288,	112, 165,	6, 4,	1869.
Sessler *a.* Harris, 3 S. W. Rep'r 316,	69,	2,	1887.
Seton *a.* Gram, 1 Hall 262,	135	7, *a*, 8,	1828.
Sewall *a.* Peltier, 12 Wend. 386,	67,	9,	1834.
Shafer *v.* Randolph, 3 Out. 250,	69,	2,	1881.
Shafer's Appeal, 10 Out. 49; 39 L. I. 304,	113,	1, *b*,	1884.
Shaler *v.* Trowbridge, 1 Stew. 595,	166,	3, *b*,	1877.
Shamburg v. Ruggles, 2 Nor. 148,	70,	2,	1876.
Shanks *v.* Klein, 14 Otto 18,	106, 110,	7, *a*, 5,	1881.
Shannon *a.* Skinner, 44 Mich. 86,	103,	*b*,	1880.
Sharp *a.* Bullen, L. R. 1 C. P. 86,	64,	*f*,	1866.
Sharp *v.* Hutchinson, 100 N. Y. 533,	37,	1,	1885.
Sharpe *a.* Meyer, 5 Taunt. 74,	27,	4,	1813.
Sheehy *v.* Mandeville, 6 Cranch 253,	93,	1,	1810.
Sheibley *a.* Hill, 68 Ga. 556,	51,	1,	1882.
Sheldon *v.* Wood, 2 Bosw. 267,	212,	5,	1857.
Shepard v. Hawley, 1 Conn. 367,	6,	2,	1815.
Sheppard *v.* Boggs, 9 Neb. 257,	209,	2,	1879.
Sherburne *a.* Walden, 15 Johns. 409,	57,	4,	1818.
Sheridan *v.* Medera, 2 Stock 469, E. & A.	57, 66,	4, 4,	1855.
Sherman *a.* Sage, 2 N. Y. 417,	8,	2,	1849.
Shibley *v.* Angle, 37 N. Y. 626,	23,	3,	1868.

Table of Cases.

Shreeve *a.* Schmertz, 12 Sm. 457, - - - - -	118,	*b*,	1869.
Shryock *a.* Weaver, 6 S. & R. 262, - - - - -	86,	4,	1820.
Shunk *a.* Bitzer, 1 W. & S. 340, - - - - -	95, 122,	*c*, 2,	1841.
Shute *a.* Rice, 5 Burr. 2611, - - - - - -	80,	1,	1770.
Siegel v. Chidsey, 4 Cas. 279, - - - - - -	106,	9, *a*,	1857.
Sill *a.* Otis, 8 Barb. 102, - - - - - - -	112,	19,	1849.
Silverman *v.* Chase, 90 Ill. 37, - - - - - -	88,	3,	1878.
Simmonds *a.* Wills, 8 Hun 189; 51 How. Pr. 48, -	59,	*m*, *q*	1876.
Simpson *a.* Tenney, 15 P. Rep,r 187, - - -	112,	4,	1887.
Sims *a.* Miller, 2 Hill 479, - - - - - - -	136,	1,	1834.
Skaife *v.* Jackson, 3 B. & C. 421, - - - - -	167,	3,	1824.
Skinner *v.* Shannon, 44 Mich. 86, - - - - -	103,	*b*,	1880.
Slade *v.* Paschal, 67 Geo. 541, - - - - - -	69,	16,	1881.
Slemmer's Appeal, 8 Sm. 168, - - - - - -	180, 209,	5, 3,	1868.
Sloan *v* Moore, 1 Wright 217, - - - - - -	114, 131, 173,	1, 1, 4,	1860.
Slocum *v.* Fairchild, 7 Hill 292, - - - - -	62,	*f*,	1843.
Slutts *v.* Chafee, 48 Wis. 617, - - - - - -	81,	1,	1880.
Small *a.* Wish, 1 Camp. 329, - - - - - -	27,	1,	1808.
Smalley *a.* Hill, 8 Vr. 103, - - - - - -	173,	8,	1874.
Smarte *v.* Edsun, 1 Lev. 30, - - - - - -	103,	7,	1661,
Smith *a.* Argall, 5 Denio 435, - - - - - -	37,	3, *g*,	1846.
Smith *v.* Ayer, 13 Otto 320, - - - - - - -	74,	5,	1879.
Smith *a.* Bagley, 10 N. Y. 489, - - - - - -	174, 212,	2, 3,	1853.
Smith *v.* Black, 9 S. & R. 142, - - - - - -	84,	1,	1822.
Smith *a.* Boston Smelting Co., 13 R. I. 27, - -	64,	2,	1883.
Smith *v.* Burnham, 3 Sumner 435, - - - - -	10,	10,	1838.
Smith *a.* Cady, 12 Neb. 628, - - - - - -	75,	1,	1882.
Smith *a.* Calkins, 46 N. Y. 614, - - - - -	167,	1, *a*,	1872.
Smith *a.* Craig, 15 Pac. Rep'r 337, - - - - -	95,	1.	1887.
Smith *a.* Davis, 2 S. Rep'r, 897, - - - - -	112,	1,	1887.
Smith *a.* Eldridge, 144 Mass. 135, - - - - -	130,	15,	1887.
Smith *v.* Felton, 43 N. Y. 418, - - - - - -	130,	5, *b*,	1870.
Smith *a.* Grace, 2 Wm. Bl. 997, - - - - -	55, 66,	1, 3,	1775.
Smith *v.* Gregg, 9 Neb. 212, - - - - - -	76,	1,	1879.
Smith *a.* Helmore, 35 Ch. D. 436, 449, - - - -	104, 183,	5, 1,	1885.
Smith *v.* Hill, 45 Vt. 372, - - - - - - -	69,	12,	1850.
Smith *a.* Hodgman, 13 Barb. 302, - - - - -	59,	3,	1852.
Smith *v.* Howard, 20 How. Pr. 121, - - - - -	106,	9, *b*,	1859.
Smith *v.* Jackson, 2 Ed. Ch. 28, - - - - - -	13, 109, 112,	3, 3, 16, *a*,	1833.
Smith *v.* Loring, 2 Ohio 440, - - - - - -	126, 167, 192,	1, 8, *a*, 3,	1825.
Smith *v.* McDonald, 1 South. 103, - - - - -	76,	5,	1818.
Smith *a.* Mifflin, 17 S. & R, 165, - - - - -	76,	18,	1827
Smith *a.* Mittnight, 2 C. E. Gr. 259, - - - - -	106,	5, *c*,	1865.
Smith *v.* Mulock, 1 Rob. 569, - - - - - -	178,	4,	1863.
Smith *a.* Myers, 29 O. St. 120, - - - - - -	216,	2,	1876.
Smith *v.* Myler, 10 Harris 136, - - - - - -	130,	1, 9,	1853

TABLE OF CASES.

Smith *a.* Noakes, 1 Yeates 238, - - - - -	112,	15,	1793.
Smith *v.* Orsee, 42 N. Y. 132, - - - - - -	104,	4,	1870.
Smith *a.* Parke, 4 W. & S. 290, - - - - - -	117,	*a*,	1842.
Smith *v.* Percy, 5 Dutch. 74, - - - - - -	27,	2,	1860.
Smith *a.* Raub, 28 N. W. R. 676, - - - - -	10,	5,	1866.
Smith *a.* Robertson, 18 Johns. 459, - - - - -	84,	1,	1821.
Smith *v.* Tarlton, 2 Barb. Ch. 336, - - - - -	10,	11,	1847.
Smith *a.* Thayer, 116 Mass. 363, - - - - -	124,	5,	1874.
Smith *v.* Walker, 57 Mich. 459, - - - - - -	209,	1, *d*,	1885.
Smith *v.* Watson, 2 B. & C. 401, - - - - -	27, 48,	3, 2,	1824.
Smith *v.* Wright, 1 Abb. Pr. 243, - - - - -	44,	8,	1854.
Snider *a.* Colhoun, 6 Binney 135, . - - - -	109,	7,	1813.
Snively *a.* Luce, 4 Watts 396, - - - - - -	100,	7,	1835.
Snodgrass' Appeal, 1 Harris 471, - - - - -	106,	9, *a*,	1850.
Snover *a.* Blair, 5 Hal. 153, - - - - - -	178,	5,	1828.
Snyder *v.* Burnett, 81 N. Y. 550, - - - - -	68,	2,	1880.
Sociéte de l'Isère, 5 Rev. des Sociétés, - - - -	50,	3,	1887.
Society Perun *v.* Cleveland, 43 O. St. 481, - -	24,	3,	1885.
Solomon *v.* Kirkwood, 55 Mich. 256, - - - -	174,	1, *a*,	1884.
Somes *a.* Docker, 2 Mylne & K. 653, - - - -	43,	1,	1834.
So. White Lead Co. *v.* Haas, 25 N. W. 493; 33 N. W. 657,	123,	1,	1887.
Spalding *a.* Bowman, 2 S. W. Rep'r 911, - - - -	145,	1,	1887.
Sparhawk *v.* Drexel, 1 W. N. 560, - - - - -	164,	3,	1875.
Sparman *v.* Keim, 83 N. Y. 245, - - - - -	136,	4, *a*,	1880.
Sparrow *v.* Kohn, 3 E. R, 293, - - - - - -	76,	16,	1885.
Speer *v.* Bishop, 24 O. St. 598, - - - - - -	70,	2,	1874.
Spencer *a.* Ballou, 4 Cowen 163, - - - - -	8,	1,	1825.
Spencer *a.* Price, 7 Phila. 179, - - - - - - 40 L. I. 76, - - - - - -	161,	2,	1870. 1873.
Sponeberger *a.* Feigley, 5 W. & S. 564, - - - -	152,	1,	1843.
Sprague *a.* Hoyt, 103 U. S. 613, - - - - -	106,	5, *f*,	1880.
Sprague *a.* Metropolis Nat. Bank, 5 C. E. Gr. 13, -	194,	4,	1869.
Sprague *a.* Staples, 75 Me. 458, - - - - - -	52,		1883.
Staats *v.* Bristow, 73 N. Y. 264, - - - - - -	103,	3,	1878.
Stambaugh *a.* Ag. & Manuf's Bank, 13 S. & R. 299,	106,	8, *d*,	1825.
Stamets *v.* Quinn, 11 C. E. Gr. 383, - - - - -	201,	3,	1876.
Stanbridge *v.* Catanach, 2 Nor. 368, - - - - -	121,	9,	1877.
Stanford *a.* Sweeney, 67 Cal. 635, - - - - -	76,	17,	1885.
Stanton *v.* Westover, 101 N. Y. 265, - - - - -	178,	5,	1886.
Staples *v.* Sprague, 75 Me. 458, - - - - - -	52,		1883.
Stapp *a.* Strong, 15 Pac. 835, - - - - - -	208,	2,	1887.
Stauffer *a.* Doner, 1 Pa. 203, - - - - - -	102,	1, 2,	1829.
Staughton *v.* Lynch, 6 Johns. Ch. 467, - - - -	208,	6,	1815.
Stear a. Johnson, 109 Engl. Com. L. Rep. N. S., 341, n.	47,	3, *b*,	1869.
Stearns *a.* Dana, 3 Cush. 372, - - - - - -	137,	4,	1849.
Steel *a.* Bogue, 1 Ph. Rep. 90, - - - - - -	104,	10,	1850.
Steel *v.* Frick, 6 Sm. 172, - - - - - - -	12,	1,	1867.
Steele *a.* Campbell, 1 Jones 394, - - - - -	84,	3,	1849.
Steinbeisser *a.* Hoffman, 11 W. N. 383 (C. P. 4) -	190,	1,	1881.
Steinman *a.* Latshaw, 11 S. & R. 357, - - - -	94, 95,	*a*, *a*,	1824.
Stellwagen *a.* Graser, 25 N. Y. 315, - - - - -	114,	2,	1862.
Stephens *a.* Palmer, 1 Denio 471, - - - - -	131,	3, *a*,	1845.
Sterrett *a.* Brewster, 8 Casey 115, - - - - -	88, 106,	2, 7, *a*,	1858.
Stevens *a.* Day, 88 N. C. 79, - - - - - -	12,	1,	1883.

Stevens *v.* Gainesville Nat. Bank, 62 Texas 499,	51,	1,	1884.
Stewart *v.* Abrams, 7 Watts 448,	94, 95,	*b,* *b,*	1838.
Stewart *a.* Cassels, 6 App. Cas. 64,	172,	1,	1881.
Stewart *v.* Coulter, 12 S. & R. 252,	130,	7,	1825.
Stidger *v.* Reynolds, 19 Ohio 351,	207,	4,	1841.
Stileman *a.* Caldwell, 1 Rawle 212,	175,	1,	1829.
Stiles *v.* Meyer, 7 Lans. 190,	69,	9,	1872.
Stillman *v.* Harvey, 47 Conn. 26,	133	4,	1879.
Stocker *v.* Brockelbank, 3 McN. & G. 250, 15 Jurist 591,	59, 60,	*j,* 1,	1851.
Stone *a.* Gibson, 43 Barb. 285,	63,	2,	1865.
Stoner *v.* Stroman, 9 W. & S. 85,	89,	2,	1845.
Stout *v.* Seabrook, 3 Stew. 187,	213,	3,	1878.
Straiton *v.* N. Y. & N. H. R. R., 2 E. D. Sm. 184,	62,	*e,*	1853.
Strang *v.* Bradner, 114 U. S. 555,	141,	2,	1884.
Straus *a.* Johnson, 26 Fed. Rep'r 57,	106, 107,	1, *d,* 4,	1882.
Stringer *a.* Millett, 17 Abb. Pr. 152	41,	2,	1858.
Stroman *a.* Stoner, 9 W. & S. 85,	89,	2,	1845.
Strong *v.* Stapp, 15 Pac. 835,	208,	2,	1887.
Strong *v.* Miles, 45 Conn. 52,	167,	5, *d,*	1877.
Stroud *a.* Russell, 12 W. N. 419,	103,	1,	1882.
Struthers *v.* Pearce, 51 N. Y. 357, 365,	212,	9,	1873.
Stumph *v.* Baur, 76 Ind. 157,	27,	1,	1881.
Sturges *a.* Cheeseman, 6 Bosw. 520,	156, 208,	4, 1,	1860.
Styring *a.* French, 2 C. B. N. S. 357,	67,	7,	1857.
Sullivan *v.* Campbell, 2 Hall 271,	134,	1,	1829.
Sumner *a.* Buchan, 2 Barb. Ch, 165,	110,	4,	1847.
Sumner *v.* Hampton, 8 Ohio 328, 365,	112,	14,	1838.
Supplee *a.* Gavit, 2 W. N. C. 561,	121,	9,	1876.
Sutro *v.* Wagner, 8 C. E. Gr. 388,	180,	3,	1873.
Suttle *a.* Rogers, 19 Bradwell 163,	69,	17,	1885.
Sutton *v.* Irwine, 12 S. & R. 13,	129,	1,	1824.
Suydam *v.* Barber 6 Duer 34,	84,	4,	1856.
Suydam *a.* Corwin, 24 O. St. 209,	167,	5, *e,*	1873.
Sweeney *v.* Stanford, 67 Cal. 635,	76,	17,	1885.
Sweet *a.* Fisher, 67 Cal. 228,	12,	2,	1885.
Sweet *v.* Morrison, 7 E. Rep'r 389,	206,	2,	1886.
Sweet *a.* Prouty, 51 N. Y. 594,	59,	*i,*	1873.
Sweetzer *a.* Place, 10 Ohio 142,	100, 103,	*d,* 5,	1847.
Syers *v.* Syers, 1 App. Cas. 174,	31, 57,	1, 1,	1876.
Taft *v.* Schwamb, 80 Ill. 289,	32,	3,	1875.
Tait *v.* Murphy, 2 S. Rep'r 317,	100,	*b,*	1887.
Tanner *v.* Hall, 1 Barr 417,	127,	2, *a,* 4, *a,*	1845.
Tanner *v.* Hills, 48 N. Y. 662,	12,	1,	1872.
Tapscot *a.* Brown, 6 M. & W. 119,	134,	2,	1840.
Tarlton *a.* Smith, 2 Barb. Ch. 336,	10,	11,	1847.
Tarr *a.* Dodd, 116 Mass. 287,	156,	3,	1874.
Tasker *a.* Cookingham, 2 Keyes 454,	76,	12,	1866.

Tassey *v.* Church, 6 W. & S. 465,	161,	6,	1843.
Taylor, ex parte, 2 Rose 175,	201,	2,	1814.
Taylor *v.* Castle, 42 Cal. 367,	15,	1,	1871.
Taylor *v.* Coryell, 12 S. & R. 243,	120,	*a*,	1824.
Taylor *v.* Henderson, 17 S. & R. 453,	119,	*d*,	1828.
Taylor *a.* Seelye, 32 La. An. 1115,	30,	1,	1880.
Taylor *v.* Smith, 116 Mass. 363,	124,	5,	1874.
Taylor *v.* Webster, 10 Vr. 102, E. & A.,	69,	14,	1878.
Teed *v.* Elworthy, 14 East 210,	76,	8,	1811.
Teel *a.* Howell, 2 Stew. 490,	111,	1, 5,	1878.
Tellers *v.* Muir, Pen. 749,	121,	4,	1811.
Tellyett *v.* Markham, 57 Geo. 11,	32,	1,	1876.
Templar *v.* Bank, 26 Fed. Rep'r. 580,	178,	1,	1886.
Tench *v.* Roberts, 6 Madd. Ch. 145,	211,	2,	1819.
Tenney *v.* Foote, 95 Ill. 99,	139,	3,	1880.
Tenney *v.* Johnson, 43 N. H. 144,	194,	3,	1864.
Tenney *v.* Simpson, 15 P. Rep'r. 187,	112,	4,	1887.
Terrell, Ex parte, Buck 345,	201,	4,	1819.
Tharp *a.* Kingsbury, 28 N. W. R. 74,	21,	2,	1886.
Thayer *a.* Wait, 118 Mass. 473,	127,	1,	1875.
Thielens *a.* White, 10 Out. 173,	150,	1,	1884.
Thomas *v.* Brown, 10 Atl. Rep'r 713,	173,	12,	1887.
Thomas *a.* Calkett, 1 Phil. 463,	113,	5,	1853.
Thomas *a.* Chapman, 4 Keyes 210,	200,	2,	1868.
Thomas *a.* Hopkins, 28 N. W. Rep'r 147,	128,	1,	1881.
Thomas *a.* Lane, 37 Tex. 157,	211,	1,	1872.
Thomas *a.* Lloyd, 29 Sm. 68,	184,	6,	1875,
Thomas *a.* Nat. Bank of Salem, 47 N. Y. 15,	128,	3,	1871.
Thomas *a.* Page, 43 Ohio St. 38,	111,	10,	1885.
Thomas *v.* Pennrick, 28 O. St. 55,	167,	4, *b*,	1878.
Thompson *a.* Brenton, 20 L. I. 133	{ 102, { 106,	*a*, 5, *a*,	1863.
Thompson *a.* Brown, Coxe 2,	130,	7, *a*,	1790.
Thompson *a.* Edmanson, 8 Jur. N. S. 235,	17,	2,	1861.
Thompson *a.* Lynch, 66 Miss. 354,	52,		1883.
Thomson *v.* Williamson, 7 Bligh. 432.	36,	5,	1831.
Thrift *a.* Morganstern, 66 Cal. 577,	47,	3,	1885.
Thursby *v.* Lidgerwood, 69 N. Y. 198,	117,	1,	1877.
Tibbals *v.* Sargeant, 1 McCart. 449,	182,	1,	1862.
Tiffany *v.* Crawford, 1 McCart. Ch. 278,	111,	14,	1862.
Till's Case, 2 Neb. 261,	106,	5, *b*,	1874.
Tilton *a.* Benson, 58 N. H. 137,	215,	3,	1877.
Todd *v.* Lorah, 25 Smith 155,	169,	1,	1874.
Todd *v.* Rafferty, 3 Stew. 254,	212,	7,	1878.
Tolman *v.* Hanrahan, 44 Wis. 133,	124,	1,	1878.
Tomlinson *v.* Burke, 5 Hal. 295,	76,	2,	1829.
Tomlinson *v.* Nelson, 49 Wis. 679,	156,	3,	1880.
Tomson *v.* Campbell, 5 W. & S. 16,	36,	5,	1831.
Tonroe *a.* Wightman, 4 Taunt. 412,	73,	1,	1813.
Tooke *a.* Bryan, 60 Geo. 437,	125,	5,	1878.
Toppan *a.* Coddington, 11 C. E. Gr. 141,	101,	1,	1875.
Topping, Ex parte, 4 D. J. & S. 551,	199,	1,	1865.
Topping *v.* Paddock, 92 Ill. 92,	20,	3,	1879.
Torrey *a.* Fowle, 125 Mass. 289,	170,	4,	1881.
Townsend *a.* Auten, Pen. 744,	76,	4,	1811.
Townsend *v.* Goeway, 19 Wend. 424,	158,	1,	1838.
Townsend *v.* Long, 27 Sm. 143,	148,	4,	1874.

Tracy *a.* Edwards, 12 Sm. 374,	67,	12,	1869.
Tracy *v.* McManus, 58 N. Y. 257,	48, 67,	3, *c*, 13,	1874.
Traphagen *v.* Burt, 67 N. Y. 30,	10,	4,	1876.
Treadwell *v.* Williams, 9 Bosw. 649,	112, 171,	20, 4,	1862.
Tremper *v.* Conklin, 44 N. Y. 61,	100, 103,	5, 2,	1870.
Trenton Loc. & Mach. Mfg. Co. *a.* Van Kuren, 2 Beas. 302,	45,		1861.
Trethewy *a.* Ackland, 2 Saunders 51,	103,	7,	1669.
Trowbridge *v.* Cross, 117 Ill. 109,	103,	*a*,	1886.
Trowbridge *a.* Shaler, 1 Stew. 595,	166,	3, *b*,	1877.
Trowbridge *v.* Wetherbee, 11 Allen 361,	10,	11,	1865.
True *a.* Sceva, 53 N. H. 632,	46,	1,	1873.
Tua *v.* Carrière, 117 U. S. R. 201,	175,	3,	1886.
Tucker *a.* Isles, 5 Duer. 393,	137,	6,	1856.
Tucker *v.* Oxley, 5 Cranch 34,	105,	2,	1809.
Tupper *a.* Labouchere, 11 Moore P. C. 198,	73,	1,	1857.
Tupper *a* Sager, 38 Mich. 258,	44,	2,	1878.
Turner *v.* Jaycox, 40 N. Y. 470,	106, 170,	9, *b*, 3,	1869.
Turner *v.* Turner, 5 S. W. Rep'r 457,	207,	2,	1887.
Tustin *v.* Cameron, 5 Wharton 379,	130,	10,	1840.
Twisden *a.* Cleather, 28 Ch. Div. 340,	140,	1,	1884.
U. Insurance Co. *a.* Holmes, 2 Johns. Cas. 329,	17,	1,	1801.
Uhler *v.* Browning, 4 Dutch. 79,	125,	2,	1859.
Uhler *v.* Semple, 5 C. E. Gr. 288.	112, 165,	6, 4,	1869.
Ulman *v.* Briggs, 32 La. An. 657,	37,	3, *h*,	1880.
United Insurance Co. *v.* Scott, 1 Johns. 106,	49,	6, *a*,	1806.
United States *v.* Lewis, 13 Nat. Bank'cy Reg'r 33,	204,	3,	1876.
Unruh's Estate, 13 Phila. 337,	36,	6,	1880.
Valentine *v.* Hickle, 39 O. St. 19,	19,	7,	1883.
Valentine *a.* Meehan, 29 F. Rep'r 276,	59,	3,	1886.
Valpy *a.* Dickinson, 10 B. & C. 128,	23,	4,	1829.
Van Brunt *v.* Applegate, 44 N. Y. 544,	112,	18,	1871.
Vanderbilt *a.* Briggs, 19 Barb. 222,	62,	*e*,	1855.
Vanderburgh *v.* Hull, 20 Wend. 70,	59,	*c*,	1838.
Vanderhorst *a.* Bank of New York, 32 N. Y. 553,	103,	2,	1865.
Vanderslice *a.* Commonwealth, 8 S. & R. 452,	103,	8,	1822.
Van Kuren *v.* Trenton Loc. & M. Mfg. Co., 2 Beas. 302,	45,		1861.
Vanneman a. McCredy, Pen. 870,	76,	2,	1811.
Van Pelt *a.* Hervey, 4 Bosw. 60,	146,	3,	1859.
Van Rensselaer *v.* Emery, 9 How. Pr. 135,	101, 181,	1, 1,	1854.
Van Sycle *v.* Rorbach, 2 Hal. Ch. 234,	137,	1,	1847.
Vice *v.* Anson, 7 B. & C. 409,	23,	5,	1827.
Vickery *a.* Carvick, Douglas 653,	6,	1,	1781.
Vischer *a.* Harris, 57 Geo. 229,	104,	2,	1876.
Voohis *v.* Childs, 17 N. Y. 355,	86,	1,	1858.
Voorhees *a.* Hill, 10 Harris 68,	69,	17,	1853.

Voorhees *v.* Jones, 5 Dutch. 270,	52,		1865.
Vyse *v.* Forster, L. R. 7 Ch. 334,	40,	2,	1872.
L. R. 8 Ch. App. 309,	42,	3,	1870.
L. R. 7 H. of L. 318, 333,	42,	2,	1874.
Waddell *a.* Banco de Portugal, 5 Ap. Cases 161,	164,	2,	1880.
Wade *v.* Rusher, 4 Bosw. 537,	140,	3,	1859.
	166,	3, *a*,	
Wagner *a.* Sutro, 8 C. E. Gr. 388,	180,	3,	1873.
Wait *v.* Thayer, 118 Mass. 473,	127,	1,	1875.
Wakeham, in re, 13 Ch. Div. 43,	205,	6,	1884.
Walden *v.* Sherburne, 15 Johns. 409,	57,	4,	1818.
Walker *v.* Bean, 34 Minn. 437,	120,	*b*,	1886.
Walker *a.* Central City Saving Bank, 66 N. Y. 425,	24,	3,	1877.
Walker *v.* Fitts, 24 Pick. 191,	12,	1,	1837.
Walker *a.* Jones, 103 U. S. 444,	74,	3,	1880.
Walker *a.* Smith, 57 Mich. 459,	209,	1, *d*,	1885.
Walker's Appeal, 4 Pennypacker 452,	216,	1,	1884.
Wallace *v.* Fairman, 4 Watts 378,	95,	3,	1835.
	149,	2,	
Wallace *a.* Welker, 31 Ga. 362,	41,	4,	1860.
Wallace *a.* Yeager, 7 Smith 565,	152,	1,	1868.
Walsh *v.* Adams, 3 Denio 125,	104,	10,	1846.
Walsh *a.* Henn, 2 Edw. Ch. 129,	173,	6,	1833.
Walsh *v.* Kelly, 42 Barb. 98; 27 How. Pr. 559,	106,	9, *b*,	1864.
Walsh *v.* Lennon, 98 Ill. 27,	118,	*c*,	1881.
Walsh *a.* Merritt, 5 Tiffany 685,	67,	3,	1865.
Walstrom *v.* Hopkins, 7 Out. 118,	95,	5,	1883.
	149,	1,	
Walter *v.* Ginrich, 2 Watts 204,	83,	4,	1834.
Walter's Appeal, 1 Chester Co. R. 278,	25,	5,	1881.
	106,	8, *k*,	
Waltman *a.* Gay, 8 N. 453,	120,	*b*,	1879.
Wands *a.* Ensign, 1 Johns. Cas. 171,	7,	6,	1799.
Ward *a.* Ellis, 21 W. R. 100,	22,	1,	1872.
Ward *v.* Garnet, 6 Duer 257,	49,	4,	1857.
Wardell *a.* Bryant, 2 Exch. 479,	161,	4,	1848.
Warner *a.* Wood, 2 McCart. 81,	173,	8,	1862.
Warren *a.* Com. Bank of Buffalo, 15 N. Y. 577,	135,	1, *a*,	1857.
Washburn *v.* Bank of Bellows Falls, 19 Vt. 278,	106,	8, *c*,	1847.
	108,	2,	
Waterer *v.* Waterer, L. R. 15 Eq. 402,	109,	5,	1873.
Watson *a.* Dunlap, 124 Mass. 305,	188,	1,	1878.
Watson *v.* Murray, 8 C. E. Gr. 257,	211,	2,	1872.
Watson *a.* Smith, 2 B. & C. 401,	27,	3,	1824.
	48,	2,	
Watts *a.* Everit, 10 Paige 82,	69,	20,	1843.
	138,	5,	
Waugh *v.* Carver, 2 H. Bl. 235,	57,	4,	1793.
Waydell *v.* Luer, 3 Denio 410,	184,	5,	1846.
Weaver *v.* Shryock, 6 S. & R. 262,	86,	4,	1820.
Webb *v.* Helion, 3 Robt. 625,	208,	5,	1864.
Webb, in re, 16 Nat. Bank'cy Rep'r 258,	105,	2,	1875.
	195,	1,	
	196,	1,	
Webber *a.* Lewis, 116 Mass. 450,	194,	5,	1875.

TABLE OF CASES.

Weber *v.* Defor, 8 How. Pr. 502,	173,	2,	1853.
Webster *a.* Elgie, 5 M. & W. 518,	48,	2,	1839.
Webster *a.* Manh. Ins. Co., 9 Sm. 227,	103,	10,	1868.
Webster *a* Taylor, 10 Vr. 102, E. & A.	69,	14,	1878.
Weed *a.* Blodgett, 119 Mass. 215,	124,	2,	1875.
Weissenborn *a.* Seighortner, 5 C. E. Gr. 172,	173,	9,	1869.
Welker *v.* Wallace, 31 Ga. 362,	41,	4,	1860.
Wells *v.* Ellis, 68 Cal. 243,	132,	2, *a*,	1885.
Wells *v.* Gates, 18 Barb. 554,	24,	1,	1854.
Wells *a.* Hoeflinger, 47 Wis. 628,	124,	6,	1879.
Wells *a.* Partridge, 3 Stew. 176,	110,	2,	1878.
Wenn *a.* Miles, 27 Minn. 56,	91,	2,	1880.
Wentworth *v.* Raiguel, 9 Ph. 275,	162,	1, *a*,	1873.
West *a.* Ross, 2 Bosw. 390,	117,	3,	1858.
Westover *a.* Stanton, 101 N. Y. 265,	178,	5,	1886.
Westbrook *v.* Mize, 10 P. Rep'r 881,	47,	1,	1886.
Wetherbee *a.* Trowbridge, 11 Allen 361,	10,	11,	1865.
Wetherill *v.* Commonwealth, 17 W. N. 104,	106,	8, *d*,	1885.
Wetmore *v.* Baker, 9 Johns. 307,	62,	*f*,	1812.
Wetter *v.* Schlieper, 4 E. D. Smith 707,	131,	1,	1858.
Wharton *v.* Clements, 3 Del. Ch. 209,	40,	4,	1868.
Wheat *v.* Rice, 97 N. Y. 296,	144,	6,	1884.
Wheeler, Ex parte, Buck 48,	57, 58,	4, *d*,	1817.
Whitbread *a.* Janes, 11 C. B. 406,	59,	*n*,	1851.
Whitcomb *v.* Converse, 119 Mass. 38,	31,	4,	1875.
White *a.* Curry, 51 Cal. 185, 1875; 531,	81,	2,	1885.
White *v.* Hackett, 20 N. Y. 178,	37,	3, *f*,	1859.
White *a.* Hartley, 13 N. 31,	167,	7, *b*,	1880.
White *v.* Jones, 1 Rob't 321,	209,	1, *b*,	1863.
White *a.* Nichols, 85 N. Y. 531,	178,	3,	1881.
White *v.* Thielens, 10 Out. 173,	150,	1,	1884.
Whitehead *a.* Penn, 17 Gratt. 503,	138,	4,	1867.
Whitman *a.* Munro, 8 Hun 553,	32, 57,	2, 4,	1876.
Whitman *v.* Porter, 107 Mass. 522,	31,	5,	1871.
Whitney *a.* Muzzy, 10 Johns. 226,	59,	*d*,	1813.
Whittaker *v.* Collins, 34 Minn. 299,	139,	6,	1885.
Whitwell *a.* Menagh, 52 N. Y. 146,	103, 106, 107, 167,	4, 1, *b*, 4, 7, *a*,	1873.
Wiggenhorn *a.* Parmalee, 6 Neb. 322,	144,	1,	1877.
Wightman *v.* Tonroe, 4 Taunt. 412,	73,	1,	1813.
Wilcomb *a.* King, 7 Barb. 263,	110,	7,	1849.
Wilcox *v.* Kellogg, 11 Ohio 394,	194, 200,	1, 1,	1842.
Wilcox *v.* Matthews, 44 Mich. 192,	57,	4,	1880.
Wilcoxon *a.* Andrews, 25 Ch. Div. 505,	205,	3,	1884.
Wild *v.* Davenport, 7 A. R, 295,	73,	1,	1886.
Wild *v.* Dean, 3 Allen 579,	170,	4,	1862.
Wiley *a.* Lesley, 47 N. Y. 648.	76,	12,	1872.
Wilkes *a.* Dayton, 5 Bosw. 655,	147,	2,	1859.
Wilkins *v.* Budd, 1 Hal. 153,	85,	3,	1822.
Wilkins *v.* Pearce, 5 Denio 541,	133,	1,	1848.
Wilkinson *a.* Crites, 65 Cal. 559,	114,	3,	1884.
Wilkinson *v.* Frasier, 4 Esp. 182,	62,	*d*,	1805.

TABLE OF CASES.

Wilkinson *a.* Matherson, 8 Atl. Rep'r 84,	130,	1,	*b*,	1887.
Willett *v.* Blanford, 1 Hare 253,	43,	1,	*b*,	1842.
Williams *a.* Aspinwall, 1 Ohio 84,	17, 115,	1, 2,		1823.
Williams *a.* Austin, 2 Ohio 61,	44, 76,	7, 25,		1825.
Williams *a.* Cary, 1 Duer 667,	166,	2,	*a*,	1853.
Williams *a.* Crary, 2 Ohio 65,	76,	10,		1825.
Williams *a.* Froude, 56 L. T. Rep. N. S. 441,	50,	3,		1887.
Williams *v.* Gillies, 75 N. Y. 197,	10,	1,		1878.
Williams *v.* Hamilton, 1 South. 220,	130,	3,		1818.
Williams *a.* Lane, 2 Vern. 277,	5,	3,		1692.
Williams *v.* Lawrence, 47 N. Y. 462,	67,	3, 4,		1872.
Williams *a.* Lewis, 6 Wh. 263,	83,	2,		1841.
Williams *v.* McFall, 2 S. & R. 280,	81,	2,		1816.
Williams *a.* Treadwell, 9 Bosw. 649,	112, 171,	20, 4,		1862.
Williamson *a.* Thomson, 7 Bligh 432,	36,	5,		1831.
Willing *a.* Consequa, 1 Peters 301,	85,	2,		1816.
Willis v. Green, 5 Hill 232,	6,	2,		1843.
Willoughby *a.* Mayberry, 5 Neb. 368,	178,	7,		1877.
Wills *v.* Simmonds, 8 Hun 189; 51 How. Pr. 48,	59,		*m*, *q*,	1876.
Wilmont *v.* Ouachita Belle, 23 La. An. 607,	122,	5,		1880.
Wilson *v.* Cobb, 2 Stew. 361, E. & A.	54,	1,		1878.
Wilson *a.* Emery, 79 N. Y. 78,	214,	2,		1879.
Wilson, Ex parte, L. R. 7 Ch. 490,	205,	6,		1872.
Wilson *v.* Fitcher, 3 Stock. Ch. 71,	173,	7,	*b*,	1855.
Wilson *a.* Morse, 4 Term. 353,	66,	6,		1791,
Wing *a.* Ringo, 5 S. W. Rep'r 787,	171,	1,		1887.
Winslow *a.* Belleville Saving Bank, 30 F. 488,	85,	1,		1887.
Wise *a.* Putnam, 1 Hill 234,	12,	1,		1841.
Wish *v.* Small, 1 Camp. 329,	27,	1,		1808.
Wisham *v.* Lippincott, 1 Stock. 353,	78, 111,	1, 4,		1853.
Withers *a.* Hart, 1 P. & W. 285,	135,	7,	*a*,	1830.
Woehr *a.* Hartman, 3 C. E. Gr. 383,	19, 207,	8, 1,		1867.
Wolbert *v.* Harris, 3 Hal. Ch. 605,	206,	2,		1849.
Wood *a.* Blair, 12 Out. 278,	96,	1,		1885.
Wood *v.* Brush, 13 Pac. Rep'r 627,	156,	2,		1887.
Wood *a.* Egberts, 3 Paige Ch. 517,	106,	6,		1832.
Wood *v.* Erie R. R., 72 N. Y. 196,	76,	16,		1878.
Wood *a.* Homer, 11 Cush. 62,	167,	2,	*b*,	1853.
Wood *v.* Meily, 21 Sm. 488,	109,	7,		1872.
Wood *v.* Scoles, L. R. 1 Ch. 369,	35, 208,	1, 1,		1866.
Wood *a.* Sheldon, 2 Bosw. 267,	212,	5,		1857.
Wood *v.* Warner, 2 McCart. 81,	173,	8,		1862.
Wood *v.* Wood, 1 Harr. 429,	6,	2,		1838.
Wood *a.* Woodson, 37 Alb. Law Jour. 389,	184,	3,		1888.
Woodling *v.* Knickerbocker, 31 Minn. 268,	140,	4,		1883.
Woodruff *v.* King, 47 Wis. 261,	184,	4,		1879.
Woodson *v.* Wood, 37 Alb. Law Jour. 389,	184,	3,		1888.
Woodward *v.* Clark, 30 Kan. 76,	44,	3,		1883.
Woodward *a.* Curtis, 58 Wis. 499,	193,	1,		1883.
Wookey *a.* Burton, 6 Mad. Ch. 367,	151,	3,		1822.
Wortley *a.* Reg., 15 Jur. 1137,	59,		*k*,	1851.

Wray *a*. Hanna, 27 Sm. 27,	121,	9,	1874.
Wrenshall *v*. Cook, 7 Watts 464,	130,	6,	1838.
Wright *a*. Ferguson, 11 Sm. 258,	153,	1,	1869.
Wright *v*. Hooker, 10 N. Y. 51,	44,	8,	1854.
Wright *a*. McAvoy, 137 Mass. 206,	47,	1,	1884.
Wright *a*. Newbold, 4 Rawle 205,	4,	1,	1833.
Wright *a*. Smith, 1 Abb. Pr. 243,	44,	8,	1854.
Wynne *v*. Millers, 61 Geo. 345,	103,	12,	1878.
Yates *v*. Lyon, 61 N. Y. 344,	137,	2,	1874.
Yeager *v*. Wallace, 7 Sm. 565,	152,	1,	1868.
Yeoman *v*. Lasley, 40 O. S. 190,	8,	2,	1883.
Yoho *v*. McGovern, 42 O. St. 11,	84,	2,	1884.
York's Appeal, 17 N. Y. 17, 33,	145,	2,	1886.
Yorkshire Banking Co. *v*. Beaston, { L. R. 4 C. P. D. 204, L. R. 5 C. P. D. 109,	76,	19,	1880.
Young *v*. Axtell, 2 H. Bl. 242, *arg*.,	58,	*g*,	1784.
Young *v*. Brick, Pen. 663,	153,	3,	1810.
Young, Ex parte, 19 Ch. D. 124,	77,	*d*,	1881.
Young, Ex parte, 2 Rose 40,	198,	2,	1814.
Young *v*. Frier, 1 Stock. 465,	106,	5, *c*,	1853.
Young *v*. Hoglan, 52 Cal. 467,	156,	6,	1877.
Young *v*. Hunter, 4 Taunt. 582,	20,	2,	1812.
Zell's Appeal, 1 Am. 532,	208,	1,	1886.
Zimmerman *v*. Erhard, 83 N. Y. 74,	76,	15,	1880.
Zug & Co., In re., 34 Legal Int. 402,	113,	1, *a*,	1877.

INTRODUCTION.

I am astounded by the statement which both LINDLEY and POLLOCK, the leading authors who have written upon the subject, concur in making, that the law of partnership is ripe for codification. They intend by this statement to convey the meaning, That the principles of the relation, having been fully established, can be expressed in definitions and applied in formulas. How do they succeed in demonstrating the feasibility of the project? They stumble and halt on the very threshold. The definition of partnership breaks them all up. Having no guiding principle to start with, how can they create a system? Look at the law of partnership as it stands to-day, and try to point out the principle which underlies the relation. The last English case abandons the only landmark which remained to individualize a partnership.* There is no clue left to

*A lender taking a deed for a building contract, with all the rights present and prospective under it, including stock, plant and fixtures, stipulating for a share of the net profits, for the destination of the fund,

distinguish a partnership from any other agency, The Profession is thrown back on the general doctrine of Principal and Agent. This is like answering the question, What is an Englishman? by saying, There is no such person as an Englishman, distinct from any other European. The only way to find out what an Englishman is would be to study the general type of the European made up from German, French, Italian, and other stocks, not to mention Turks, and out of the medley extract the Englishman.

The relation once relegated to an abstraction, the subject-matter of partnership becomes mythical. Property, the only thing for which the partnership

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for control of the debtor, allowing him to draw out a salary from the working capital before profits were estimated, and for taking his place, do not, one and all, reveal the traits of a a co-partner in the business, but are consistent with the adverse relation of debtor and creditor. By mortgage-deed, 4 July, 1878, A advanced money to B, £1500 at a time, payable in 6 months, to carry out B's contract with C for the construction of C's railroad. A stipulated for 20 per cent. interest and 1-10 of the net profits made out of the building contract. B assigned in advance to A all the money and securities he should receive from C, and all his stock, plant and fixtures, and policies of insurance. B covenanted that he would attend to the work, complete it with due expedition, and employ the advances exclusively in the construction of the road. A had power, upon B's non-performance of any condition, or his bankruptcy, to take possession and carry on the work to completion, and B's contracts with C enured to A. A also had a power of sale. B was entitled to draw out, for his services, £1000, in quarterly instalments, before profits were computed, and A's share was charged as an advance. The correspondence between A & B called the advances 'working capital,' and A waived repayment until the completion of the contract. Directors of C, in 1881, induced D to advance money to carry on the work, and guaranteed C's bonds for £16000. In 1882 E recovered judgment against B, and attached C's debt to B. Notice of A's claim had not then been given to C. In 1883 other creditors at-

exists, and in which it deals, is discarded as a constituent of the relation. But the disputes which arise are in reference to the property of the firm, and they cannot be adjusted unless the title is located. Think of formulating the propositions which embody the doctrines of partnership without reference to the original principle out of which they are all evolved, and which give coherence to the relation! It takes something more than a man, although he has been admitted to the Bar, to make a world of partnership out of nothing.

The instant the notion of firm property is brought forward, the material is furnished for an explanation

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tached the debt. B's claim against C was adjusted at £38,000, for which B should take debenture stock and have C's bonds returned. C repaid D the sum advanced B, who was bankrupt. A sued all parties, and claimed priority. Defence: A the partner of B.—A a creditor, not a partner, of B. The exclusive application of the advances to the business did not make A a partner, because he had B's personal obligation for repayment, although the evidence showed that A did not rely upon it. The destination of the capital increased the security! The control of the debtor's use of the money borrowed may be 'peculiar,' but it does not make a loan to the business. The power to take possession and complete the contract enforces the security, and makes it effectual. The debtor must efface himself, and let the creditor manage the business, in order not to impair the security! The stipulation for profits after the loan should be refunded, though unusual, is nothing but a bonus for making the loan. A could, after he had been paid off both principal and interest, still direct and control B in his conduct of the business, in order to gain the stipulated share of profits; but this was a part of the creditor's security! The allowance to B of £1000 a year for his services is not drawing out of a common fund by the working partner, but a provision made by the creditor, in order to enable the debtor to devote himself exclusively to the business, and thereby perfect the security! Badley *v.* Consolidated Bank, 34 Ch. D. 536 (1886); 38 Ch. D. 238 (1886).

of the relation in all its bearings. As a common property is the distinctive characteristic of partnership, the fundamental principle of the relation can be established. The typical trait of partnership has been lost sight of, and no basis is left for the relation. The Profession has groped about in search of the principle for the last half-century. Not having succeeded in re-discovering it, many have come to believe that there is nothing distinctive about the relation, and they proclaim the absence of principle as the ideal of partnership.

The title to the property being the first thing to engage the attention, presents itself in two stages

Sharing the profits disclosed a property right in A. He might negative the title, and show that he claimed under B, who had the exclusive proprietorship. Then B would be sole proprietor, and his powers would correspond to his title. A could not deprive him of the right to exert his prerogatives of ownership. Every attribute of a proprietor taken away from B and given to A shows that he is sharing the proprietorship with B. The control and destination of the funds are the characteristic of an owner, and contra-distinguishes him from a creditor, who abandons his control when he parts with his title. The debtor becomes the owner, and the creditor has no control over him. The attempt to control the debtor shows that the relation of debtor and creditor is superceded and replaced by a co-proprietorship. The provision for a management by the creditor if the debtor does not succeed reveals the position of the parties, and proves that the creditor is a proprietor, and directly interested

First, the nature of the partner's contribution has to be determined. Inconsistent theories have been advanced to account for the right, and define the extent of the firm's ownership. In fact, but one State has worked out the true theory of the contribution, and all the others vacillate between conflicting theories, maintaining positions which are self-destructive. The next thing to consider is the effect of the combined contributions made by the different partners. It is the joint estate thus created which forms the basis of partnership. Until the title by which the partners hold the property of the firm is ascertained, no adjustment can be made of any right or liability

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in the business. The survival of the relation of debtor and creditor after the debt has been paid, and the control or management of the business in order to secure the profits stipulated as a bonus for the loan is a *reductio ad absurdum.*

The Hindu Rajah's case (§64, n. 4, *b*) is no precedent for this decision. That was an undoubted loan at the start. The subsequent restriction which the creditor put upon the debtor, in order to realize the debt or enforce its collection, was in the nature of execution or sequestration, and did not change the original character of the transaction. Here, on the contrary, the transaction, at its origin, is in question, and can be ascertained only by the legal effect of all the provisions, without the aid derived from a relation already established.

The abandonment of property which furnishes the standard of partnership destroys the indicia of the relation. No clue is left for establishing a partnership, except the acknowledgement of the parties.

between the partners, nor can either joint or separate creditors establish a claim against them. The nature of the property must be understood, or the principles of partnership will remain unsettled. The Profession does not exhibit the confidence which springs from conviction, based upon knowledge of the underlying principles of partnership, but trifles with first principles. The failure to comprehend the character of firm property has produced an interchange of confusion among the different States. States which consider the title joint upon one point treat it as separate upon another, and although they exchange places without rhyme or reason, no State consistently adheres to the joint title in every aspect.

The property measures the capacity of a partner. He pledges the property by each firm transaction, and thus creates a right in the firm creditor. This principle clears up the mystery of marshalling assets, one of the grand bugbears of partnership. Every country has had to acknowledge in practice a preference of the firm over the separate creditor, but no legal system has furnished a justification for the privilege except the Common law, and that has achieved the result by unconscious cerebration.

The failure to master the fundamental principle of the relation has left every question of partnership

open for revision. The trait which constitutes a partner has been the enigma of partnership for half a century. The nature of the contribution made by a partner to the firm stock, though not the subject of such an endless chain of talk, has been none the less a riddle. The nature of the joint estate, and how it has modified partnership at the Common law, has never been apprehended. The effect of the estate in creating for a partner the capacity, which the Common law refused to acknowledge, deserved attention, but attracted none. The consequence of the estate upon the doctrine of marshalling the assets also passed unobserved. Nothing but the principle will serve to reduce these main heads of partnership to certainty, and through them to transmit certainty to the multitude of minor points which depend upon them for correct adjudication.

The property alone is sufficient to make the proprietor a partner, although he takes no part in the management of the business. It is this feature which distinguishes the Common law from the Civil law partnership. It is the property which extends the private bargain of the Civil law, and converts it into the business-establishment of a Common law partnership. The dormant partner is the typical Common law partner. The failure to apprehend the charac-

teristic of the Common law type has led to covert attacks upon the dormant partner. As he could not be dislodged by himself, the attempt was made to throw the undisclosed principal overboard.† The attempt failed, and the dormant partner, the commercial type of the undisclosed principal, stands as the living embodiment of property as partnership.

Next to the principles inherent in partnership, it is important to understand what foreign elements have been permitted to intrude themselves into the relation, and to interfere with its normal functions. In this respect partnership has had to undergo radical changes. The dual position of a partner, (a survival of the *societas bonorum universorum*,) who is charged with unlimited liability, in spite of the fact that he contributes but a portion of his estate, creates a collision of rights at the start. The law adheres to tradition, and enforces the liability. Equity recognizes that the liability should be limited to the contribution, and, where its principles apply, controls the firm creditors who seek to enforce the liability against the separate estate in competition with the separate creditors. Both the legal right and the equitable control of its exercise must be apprehended, in order to appreciate the exact limits of each. The

†Edmunds *v.* Bushell, § 26, n. 1.

want of a clear understanding of the difference between the position of the firm and of the separate creditors has introduced a combat of opinion which a statement of the right and of the equity is sufficient to terminate.

The Common law has a mode of procedure peculiar to itself for enforcing the unlimited liability of a partner. The dogma of an indivisible contract was taken as the standard of the commercial contract which the partners make in transacting the business of the firm, and the partners were classified with joint contractors. Had the process for the enforcement or the breach of a joint contract been practical, the interpretation of the business contract and of the remedies to enforce it would have been adequate to the requirements of the business, and no mischief would have resulted from identifying partners with joint contractors. But the crochet of an indivisible contract and the technical trifling of medieval procedure conflicted with and transformed the business contracts of the firm. The remedy was a pitfall, and seemed designed to prevent the attainment of satisfaction, the object of the process. Partnership has had to submit to these restrictions, and to work at a disadvantage from its introduction into England up to the present day. There has been a long struggle, and it has been

carried on against the inveterate prejudice of the Profession, to provide partnership with the legal machinery which is adapted to its requirements. It is only now, and in America, that the desired result has at last been worked out. In England, the partnership procedure has been codified upon the model of the Civil law practice, and a discretion has been lodged with the judges to mould the procedure, in order to carry out the enactment. But our Profession at the old homestead still worships the Fetish of an indivisible contract. The judges have disregarded the legislative mandate, and ignored the Civil law process. They have read the conceit into the Civil law, and vitiated its process, as they did the procedure of the Common law.

The law of commercial paper has injected itself into partnership, and created a partial revolution. By means of commercial paper a partner's implied power is extended beyond the scope of the partnership business. At first, where the form of the paper indicated an individual transaction, the first taker at least could not hold the firm; but the use of commercial paper did not correspond to its form, and no notice is now suggested by the way in which the paper is drawn. The partner may employ commercial paper for his individual account, and charge his

firm. There is no limit to a partner's power in dealing with commercial paper. The important thing to remark is, that this is an exceptional power, and that it stands isolated from every other. The failure to observe that this power conflicts with partnership principles, and supercedes them for the nonce, has induced a habit of arguing by analogy which has no justification. The admitted power of a partner by means of commercial paper to make his co-partners share his individual debts is assumed to be derived from partnership principles, and thence it is argued that other exertions of power should be countenanced, because they do not exceed the power of a partner by commercial paper.

From this outline of principles, it is obvious that partnership has not been analyzed and reduced to its constituent elements, much less have the principles been worked out in detail, and classified according to their prominence in the relation. Without such analysis and elaboration, an embodiment of partnership would not be complete. The proposed code by Prof. POLLOCK contains no hint of such requirements. AUSTIN, the great advocate for a code, insisted that it should embody a system of principles. The qualifications he specified for a codifier should be recalled by those who invoke his name. Think of his standard

in comparison with modern projects! The organizing faculty of ARISTOTLE should, he said, be combined with the knowledge of the Common law possessed by COKE or ELDON.‡ Superior qualifications could hardly be conceived, and yet they are not equal to the requirements demanded for a codifier. The progress of the human mind is made in stages, and not all at once. No man, though an ARISTOTLE and ELDON rolled into one, possesses all the wisdom of his epoch, much less of all time. An attempt to put into definite propositions all the provisions of law, would of necessity be imperfect. Principles would be overlooked, misunderstood, or not brought into co-ordination with the system. The reasoning from the code would be based upon a comparison of all the parts. The construction is *e complexu*, and thus the tares would grow up together with the wheat. AUSTIN'S criticism of the French Code,* and POTHIER'S idiosyncracies incorporated in the Code Napoleon,† illustrate the effect. This process of interpretation vitiates not only the *corpus juris*, but also the lawyers who are trained to reason from arbitrary premises, without taking thought whether they are true or false.

‡ 3 AUSTIN'S Jurisprudence 377–8; 2 Ib. 362–3.

*AUSTIN Jurisprudence, 293, 205.

† § 34, n. 1. 2 Bonjean, Traité des Actions 102–3, cites an instance and states the habit.

The statutory provisions are theoretically remediable by subsequent legislation, but the work of a code is not performed by the legislators; it is thrust upon the legislature from without, and when once enacted is not easily rectified. The change of a part involves a readjustment of the whole, because the basis of construction extends to all parts. But if the code were remediable by subsequent legislation, a legislature would be required to sit like a court without interruption. What advantage would be gained by substituting a legislature for a court? The legislature has broken down even in its appropriate province. Mr. CARTER has marked out the sphere of legislative action with unequalled discrimination.* The State takes charge of the common welfare, but does not interfere with the relations between the citizens, unless they disturb the public good. It is under this rule of non-interference that the citizens of Rome and of England built up, according to their needs, the only two great systems of law which the world has seen.

Judge STRONG, in a remarkable address delivered to the law students of the University of Pennsylvania, showed how the system of popular legislation had failed to perform its function, and had thrown back

*The Proposed Codification of Our Common Law.

its work upon the courts.† It is not simply the corruption of legislative bodies which accounts for the failure, but it is the want of intelligence. The legislature is not made up of experts, who know what the law is, and how it can be improved. AUSTIN always regretted that he had not been bred to the law.‡ He felt that the source of his legal inspiration had been cut off, and that he did not master the materials which he would fain have worked up into the framework of a code. His organizing mind craved order, and he thought nothing would bring it about in law but a code. It seems strange that he should have distrusted in law the process which he made the keystone to his system. He demonstrated how the mind appropriates a principle, and assimilates it in all its details. No better explanation could be given of the reliance upon principle for guidance.* Had the suggestion been made to AUSTIN that the principle of utility should be codified, with what astonishment would he have regarded the project? Judge COOLEY has recently illustrated the process in reference to the principles of law.|| What is simpler than part-

†Introductory Address to the Law Students of the University of Pennsylvania, October, 1879.

‡The Province of Jurisprudence.

*AUSTIN'S Jurisprudence, vol. 1.

||An address entitled "The Uncertainty of the Law," 22 Am. Law Rev. 347-70, 1888.

nership? A partner is nothing but a co-proprietor in the business. The recognition of this trait, in any aspect in which it may present itself, is a difficulty only in the sense that the instance may be complicated by other traits which conflict with a proprietorship, and make its existence doubtful. No obscurity arises from the principle, though its application under the diversified phases of life may not always be simple.

The imputation cast upon judges by BENTHAM and his school is groundless. They have never usurped any prerogative. The function which they exercise is the normal process, and the only intelligent method ever yet devised to meet the wants of a community. The Roman course differed only in having free trade in *jurisconsults*, which was letting the parties choose their judge. The judicial utterance is the original method which has prevailed from the earliest times. It is pre-eminently the Common law process. The Anglo-Saxons were the embodiment of their law. Each member of the commune was an exponent of the law, and testified to its terms.* The court and jury of the present day do but represent the community and continue the legal tradition which has endured from the days of the markmen. Whether

*Dr. Karl August Rogge. Ueber das Gerichtswesen der Germanen.

the theory of HOLMES,† that the court is educated by the jury, be adopted or not, the judges formulate the principles for the common weal, and have been found by ages of experience to be the only body which can give adequate expression to the will of the community. The slur of "judge-made" law has not deterred the judges from exerting their faculties, nor will it make them abnegate their function. They should not be intimidated and seek to conceal the process by a false pretext. The maxim of *stare decisis* is a meaningless phrase, and should not be used as a blind. MILL charges lawyers with the fault of arguing as if a proposition were general when it has but a restricted meaning. The charge accurately describes the use made by lawyers of the maxim *stare decisis*. It does not mean what the words strictly import, that a judicial blunder must be perpetuated forever. The history of the Common law negatives such an absolute sense. BRACTON selected his cases mainly from the rolls of PATESHULL and RALEIGH, disregarding the rolls of all the other judges,|| and yet his book has been taken as a statement of the law. It is the only original source of early Case-law, and he wrote in order to bring the decisions to the

†HOLMES' Common Law. 113–14, 123–9.

||BRACTON'S Note Book, by MAITLAND.

attention of judges. The vast accumulation of rolls were evidently not consulted by any one. REEVES, in his history of the Common law, recapitulates the changes made in the law of England during successive reigns, and no legal writer can be consulted who does not show how the doctrines of his subject have been modified at different times. The maxim does not mean what it says. It must be interpreted in connection with its complement, which provides that a precedent, when superceded, never was law. This shows that it is only sound law which obtains in the long run, because principle is the only safe guide for human action. Why, it might be asked, take any exception to the maxim if, when correctly understood, it coincides with principle? The answer is, that this co-incidence is not recognized, and the maxim is never invoked, except to exclude the operation of a principle. A precedent, it must be borne in mind, is nothing but an experiment. If the proposition justifies itself, the principle stands, but if subsequent investigation shows that the proposition is unsound, it is set aside and replaced by the true principle.* Any attempt to stifle investigation, and

*"In strictness the decision of a judge is *not* law for succeeding cases; "it is only evidence of the law. It is the testimony of a witness who is pre-"sumed to be learned and capable, explaining what the law actually is "on the point in question. It decides the particular case, but it does not

bolster up an incorrect statement of the law, causes more mischief than undoing the wrong at first. The repeated decisions aggravate the case until, in the end, a whole mass of decisions has to be overthrown, instead of a single precedent.

It is the process of testing the cases at every recurrence by the touchstone of principle which makes the law a science. This is the method of natural science. The opportunity is afforded for verification or revision by the court after the most searching investigation and discussion by the lawyers. A history, if it existed, of legal doctrines at the Common law would show how, and when, the different groups of cases were generalized and brought into consistency with the system. No one familiar with legal thought can fail to recall instances where lawyers have unearthed and framed the principle which serves to reconcile a given line of cases, and have put the class upon its true basis of principle. The wisdom of the Common law arrangement consists in its providing for the co-operation of the Bar in making the law. The provision liberates all the latent resources of the Profession, and makes them available at all times for

"of necessity decide similar ones that follow. The succeeding judge *may* "reject the testimony of his predecessor as erroneous; he may find that "the law was not in fact what his predecessor declared it to be; he may "therefore *overrule* the prior decision." HADLEY'S Roman Law, p. 68-9.

the development of the law. The ranks of the Profession may be all but filled with ordinary and common-place judges and practitioners. It needs but one original mind to detect the latent principle which explains a congeries of cases, and to combine principles in their related order in the system. The instant the principle is announced, and its position in the hierarchy of principles disclosed, the truth is established. The discovery is recognized, like a truth of natural science, without debate or argument, and the revelation illuminates the mind with conviction. It is the free play of original thought which infuses life into the law and keeps it from stagnation. The perversion of the maxim *stare decisis*, and the adherence to precedent without reference to principle, produce the same effect as a code. The reasoning from an arbitrary premiss, vitiates the faculty of reason, cutting it off from the source of its inspiration, and the arbitrary element introduced into the law helps to fix the basis of construction for the whole *corpus juris*.

The meaning of the common saying, that periods of codification mark epochs of decay, is simply that a code excludes the co-operation of the Profession in making or developing the law. The creating force is turned off. Any science would die out which pre-

vented the closet student, the practical operator, the experimentalist, or any other follower, from contributing to the general fund of knowledge. No one can foretell from whom may come the inspiration which will advance the knowledge of all, and the co-operation of every disciple is solicited. No one is driven away.

By enacting a proposition, or adhering blindly to a precedent, the process of sifting and purifying the law by subjecting it to reason is arrested, and the law becomes a dead mass which succeeding generations of lawyers cannot utilize, as it admits of no assimilation.

When I took possession of my chair at the University of Pennsylvania, in 1874, I announced, in an introductory lecture, the plan of instruction which I should pursue, and I have endeavored to follow the course which I then marked out. The present book is the product of my work upon one topic of the course, and will illustrate my method of handling the law.

The point to which I directed the attention of the students is, that cases are the exponents of principle, and that back of the facts lies the reason which explains them. The occupation of watching the

acting forces of the law as they mould its provisions, captivates and absorbs the mind. The students become interested in the process which, while it is open only to the initiated, explains what they see going on before their eyes in the courts. They learn to appreciate a principle when they witness the transformations which it effects. One who starts with the reason for a proposition has the inside view. His mind, guided by the principle acts under its inspiration and working according to its nature, comprehends the exact extent and limit of its application. It is the weakness of statutory law that reason is excluded in interpreting its provisions. The *ipse dixit* of the legislature mocks reason.

The character of the instruction which a lecturer gives will depend upon the object he has in view. If he says the Common law is a case-system, the important thing is to take up the mechanism of a case, and teach the class how it is constructed. He would then dissect cases and think no valuable time lost which was consumed in putting the inexperienced students through the gymnastics of a case.* The result of such a method would be to turn out a

* This is the method expounded and advocated by SIDNEY G. FISHER, Esq., in an article entitled, "The Teaching of Law by the Case-System." 27 Am. Law Reg'r 416–26. He treats the class-room as a clinic for the dissection of cases, and seems to think this is the Harvard-System.

case-lawyer, whose aim would be to familiarize himself with as many cases as possible. If he could classify them in series, the segregation would enable him to memorize them with greater ease, and he would accordingly start with what are called leading cases. The subsequent decisions would be grouped under the first, but as the combination of facts does not recur, the process would be imperfect, and with the succession of cases become more and more confused. Sub-divisions would keep up only the show of classification. Cases spring up everywhere which admit of no such grouping. They are indexed as novel points, and soon fill a digest. In the end the digests and text books are overwhelmed with a mass of unassorted cases.

It is needless to say that no Law School adopts this course of instruction. It is the want of the training given by Law Schools that accounts for this plan of case-juggling. Even a 'mast-fed' lawyer, as Lincoln jocosely said he was, would not follow such a plan, if he had the mental aptitude to reason for himself.

To try and fit one case to another without recurring to the principle which connects them to a common system is to make a patch-work or mosaic of the law. The course of instruction at Harvard, if Judge

HOLMES' book† and Prof. AMES' articles‡ disclose the process, is the historical method. The early cases are studied in order to discover the origin of each principle at the Common law, and when it is detected the course of its subsequent development is pointed out.

There is, however, a method of instruction which disregards first principles, and adheres to secondary ones. The principle immersed in the facts of a case must always be extracted and stated in the form of a proposition. The analysis of a case is the preliminary step in reaching the proposition. The lawyer represents, or assumes to represent, the logical faculty. The case having been reduced to its constituent elements and stated in the form adapted for reasoning, becomes a starting point. No inquiry, however, is made into the origin of the rule, or its connection with any other branch of the law. The deductions made from the premises may be strictly accurate and logical, but the failure to connect them with each other in a system destroys the interdependence of the parts in the whole. By severing a principle from its stock, the life of the limb is taken away, and the proposition becomes an arbitrary state-

† The Common Law, by OLIVER W. HOLMES, JR., 1881.

‡ "The History of Assnmpsit." 2 Harvard Law Rev. 54–69, 1888.

ment. The reasoning faculty is perverted by making it deal with counters instead of with principles. It is this eccentric feature which gives to so much of legal reasoning its anomalous character. The sweeping language of lawyers is misleading. They affect to to be reasoning on general principles, when the language is in fact confined to an abbreviated proposition, and does not comprehend what its terms import.

The true method of instruction involves the historical, the dogmatic, and the comparative study of law. The origin of a principle must be investigated, its development traced from its first appearance down to its last manifestation, and the changes noted which it has produced, as well as the principles which have met and counteracted it. The principle may be latent, and require side lights to make its presence visible. The interdependence of the parts in a system must be understood, in order to realize the relative force of any given principle. The instruction includes a comparative study of other systems of law, which have had the same problems to solve, in order to ascertain how best the purposes of law can be accomplished.

The direction given to the course of thought when the student's mind is first awakened to the idea of

law controls him throughout his subsequent career. The students of the University of Pennsylvania have been led to approach the study of law in the scientific spirit, and have carried the original impetus into their subsequent work. The law, they see, is a science, and its process conforms to the scientific method both of investigation and verification. The graduates of the University of Pennsylvania exhibit the advantages of studying the law in the scientific spirit, and would not, it is safe to predict, exchange the method which they acquired at that University for any competitive scheme of legal education.

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THE

PRINCIPLES OF PARTNERSHIP.

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PARTNERSHIP.

The subject of partnership naturally divides itself into three parts:

1. Assuming the position of a partner, or what constitutes a partner.

2. The principles which regulate partnership during its existence; and

3. The principles by which the business is wound up.

Part I.

Assuming the position of a partner, or what constitutes a partner

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CHAPTER I.

THE ORIGIN AND GROWTH OF PARTNERSHIP.

§ 1.

The relation of the partners between themselves was the legal aspect of the subject at the Roman law, while at the Common law the effect upon third persons of one's acting as a partner is the question for discussion.

Partnership existed at the Roman law, which defined the relations of the partners among themselves. Being founded upon confidence, the ideal of good faith was enforced. The partners became mutual trustees in the business. Fairness required that each should share the profits in proportion to the contribution he made to the business, and the law prescribed an adjustment of the interests upon this basis.[1]

The Common law leaves the domestic equation to the agreement of the parties, and sanctions any arrangement they see fit to make among themselves. It is only in the absence of any contract that the law supplies its place and regulates the status of the partners. The main discussion of partnership involves the rights of third persons against a firm, and upon this point the Roman law was almost silent.

Partnership at the Roman law antedates contract. The origin of the relation goes far back to the worship of ancestors, *patrem et matrem venerari oportet.* D. 37, 15, 1, 2.

The parents and children form a partnership, *secta*, *societas.* It is a tie of blood, and binds the kin together, *consortes*, by sacred rites. The family partnership executes blood vengeance, *suas suorumque injurias persequitur.*

The joint property results from the union of persons, *herctum non citum*, and accounts for the partnership of all property rights, *societas omnium bonorum*, and explains ULPIAN'S description of partnership as a kind of brotherhood, *cum societas jus quodammodo fraternitatis in se habeat*, D. 17, 2, 63, which exacts the utmost good faith from its members, *fratres consortes.* The reciprocal obligations were enforced by the *familiae herciscundae actio.*

The patron and client enlarged the relation and introduced the voluntary element. This, in time, became the distinctive trait of a partnership. A joint possession or ownership which did not arise from a contract was called a *communitas*, to denote the specification which had been made, but the only difference between them lay in the method of acquisition. Co-owners or co-tenants of land might be partners in it, not because they converted the land into merchandise for traffic, but simply because they effected a joint purchase, and without reference to any use or disposition they might make of the land. Two monks, who bought a saddle-horse for each to ride, were partners in the animal. The *actio pro socio* was confined to the partnership by contract.

The trade-partnership arose from farming the public revenues, which overtaxed the administrative resources of the Republic, and was committed to private individuals.[2]

The purpose, which induced the partners to enter the relation, served as a basis for a classification of partnership. Gain being the leading impulse for action, made the grand division a partnership for gain, *societas ex quaestu*, or a partnership not for gain.[3]

The only kind which corresponds with the trade-partnership of modern times is the *societas ex quaestu.*

1. 15 Glück's Erläuterung der Pandecten 304–26. §. 966.
2. Zur Geschichte der Römischen Societas von Dr. B. W. Leist, Jena, 1881.
3. 15 Glück; §. 962, 963.

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§2.

Partnership existed before contract regulated its terms, and the primitive relation is not remodeled by the doctrine of consideration.

Partnership grew up in the middle ages, and there assumed its modern form. The history of the various firms which flourished during that period has been investigated, and the partners seem, generally, to have been related as members of a family. The headquarters were at the family seat, and branches were established, or travelling members sent out, when occasion required, to extend the business.[1] It needed the intimacy and trust of kinship to carry on trade in a predatory period, and the necessity added new force to the canon of the Roman law, that partnership is a relation of the strictest confidence.

When the question arose in our law: May the family relation serve as the basis of a partnership? a collision of theories presented itself, owing to the fact that with us the element of consideration had become the controlling factor in contractual relations. It was assumed that the contract of partnership, like all other contracts, required a consideration to uphold it. The family relation of the partners rebuts the presumption of a consideration between members, and prevents a contract from being implied by law. But

the argument overlooks the medieval practice of family partnerships, and makes the modern graft of consideration sap the trunk of the partnership tree. Without reference to either history or consideration, the question was settled in conformity with medieval tradition.[2]

1. Handelsgesellschaften in den deutschen Stadtrechtsquellen des Mittelalters von Friedrich Gustav Adolf Schmidt, 1883.

2. *Family relation don't rebut inference of partnership arising from joint transactions.* Joseph Ratzer, in 1865, bought carts and started business as a carter. In 1866, his father, John, began buying brewers' grain, and Felix, his son, joined them; followed by John, a third son, in 1867. From 1866 to 1868 they traded as J. & F. Ratzer; then changed to Ratzer Bros. The proceeds of business went to the mother, who supported them and supplied them with pocket-money. John and Joseph brought bill for account. Defence: No partnership, but plaintiffs obtained support for their services. Felix' testimony, that original firm was John, Sr., and Felix, negatived by his admissions, confirmed by change of name to Bros. when third brother entered, and by father's admission that sons owned the business.—Account. Transacting business together, though without an agreement, implies a partnership, and entitles each member to share the profits equally. Ratzer v. Ratzer, 1 Stew. 137 (1877).

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§3.

When partnership was introduced as a function of trade, property, being the subject-matter of trade, was deemed to charge the proprietor who contributed to the firm with the unlimited liability of a partner, although he took no part in the management of the business.

Partnership entered the Common law through trade or commerce, and the Law Merchant governs, it is said, the relation. But this is true only of a few principles adopted apparently at haphazard. The earlier statutes of the various sea-port towns on the continent of Europe have been collated, and they establish the law of the then commercial world. The

result of the enactments is that in medieval times the test of general liability as a partner was his joining as a proprietor in the management of the business. He must be both an owner and a manager. The *Commenda*, or property contributed to a business conducted by others, did not of itself personally charge the contributing partner, who took no part in the management, for any liability incurred in the transaction of the business. He staked his contribution in the venture, and that was all he could lose, if the enterprise failed.[1] The Common law did not adopt the Law Merchant upon this point, but modified it by interjecting a feudal notion into the trade relation of partnership. The joining in trade was not interpreted according to its natural form and effect, simply as the co-operation of proprietors in the management of a business, but the element of property was made the dominant factor, and property embarked in trade became itself a sufficient basis for the relation.

Under the Feudal law all the rights and duties of the individual took root in the possession of property. Land, the most usual and important form of property, became, in effect, though not in name, a legal person, and the man a mere incident or *locum tenens*. Personal property never had this independent legal status, but the habit of mind acquired in dealing with real estate led the common lawyers to personify the contribution of a partner. Starting with the physical fact of contribution, the rights and responsibilities of the contributor were the result of its commercial movement. The joinder of property was deemed sufficient to charge the owner, although he did not, as a

person, join in the business, or take part in its management or direction.

THIS NOVELTY IN LAW HAS EFFECTED A REVOLUTION IN PARTNERSHIP, AND MADE THE COMMON LAW TYPE A DISTINCT SPECIES, UNLIKE THE PARTNERSHIP OF THE LAW MERCHANT. THE CHANGE RESULTED FROM THE UNCONSCIOUS ADHERENCE TO FEUDAL TRADITIONS WHILE PROFESSING TO ADOPT THE PRINCIPLES OF TRADE. THE METAMORPHOSIS IS SO COMPLETE THAT THE NORMAL TYPE, NOW INTRODUCED BY STATUTE UNDER THE NAME OF SPECIAL PARTNERSHIP, IS NOT RECOGNIZED BY THE PROFESSION, BUT IS MISTAKEN FOR A MONGREL CROSS BETWEEN A LOAN AND A PARTNERSHIP.

1. Das Recht der Commanditgesellschaften von Achilles Renaud, Einleitung, Leipzig, 1881.

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§4.

The contribution established the position of a proprietor, which in turn became the measure of a partner's prerogatives and liabilities toward third persons.

The contribution identifies a partner, because it shows that he is a proprietor of the business. The contribution might consist of skill or service as well as of money. If the parties chose to consider influence, experience, or address, equivalent to a money consideration, the law accepted what the parties had agreed upon, and gave effect to the contract, which invested the contributing partner with the rights of a proprietor.

The result is not changed if the contribution is waived, for third persons judge only by the effect, which invests the partner with the rights of a proprietor. The waiver of any contribution is a private arrangement between the partners, which does not affect outsiders.

It is because a share of the profits indicated a proprietor's rights, that the sharing was made the test of a partner. It is essential to make the partner a proprietor, in order to invest him with his necessary prerogatives, because at the Common law the possession of property does not imply any power of disposition, property being tenure, or the right to hold, not the right to sell.

As property at the Common law partakes of the nature of a bailment, the power to sell, which is the highest right of dominion, does not carry with it everything less than an absolute disposition, on the principle that the greater includes the less.[1]

On the contrary, the power of bailees is restricted to the grant, although strangers are ignorant of any limitation of its extent.[2] In a joint business venture, the possession of property by a partner must be coupled with a proprietary right to it, or no one could safely deal with the possessor.

1. There was a struggle between the competing principles of property and of bailment. It is asserted that the Common law did recognize the deduction, and held that the right to sell carried any right less than a sale, e. g., to pledge. MEREDITH *arguendo.* Newbold v. Wright, 4 Rawle 205–6. Pa. (1833). The inference was extended to a peculiar species of disposition. The right to emancipate and enfeoff a villain was the ground adopted to sustain the lord's contracts with him; by which copyholds were created. "*Quia si dominus potest villanum manumittere et feoffare, multo potius poterit ei quandam conventionem facere, et quia si potest id quod plus est, potest multo fortius id quod minus est.* Bracton, De Legibus, lib. iv, cap. 28. fol, 209.

2. *Bailee no capacity to sell. If authority by a different capacity, proof must show the sale was made en autre droit.* A stored a piano with a second-hand dealer, who sent it to the auctioneer and had it sold. The buyer acquired no title. Though the dealer's business was to buy and sell at auction, he received the piano on storage. The storage was simply a bailment, and did not authorize the bailee to sell, any more than leaving a watch to be repaired would authorize the jeweler to sell it. Quin v. Davis, 28 Sm., 15. Pa. (1875).

§5.

The Law Merchant created the power, which a partner possesses, to buy,[1] sell,[2] or make any contract in the course of trade.[3]

The Common law recognized joint ownership and joint possession, but neither owner nor possessor could alien or mortgage his co-tenant's share, for only the holding, whether of title or of possession, was in common. A partner acquired the right to sell or pledge his co-partner's share, because the partnership was an organ of trade. If the partners were required to join in transacting business, the firm would be an obstacle, not a facility, to trade. The courts, to meet the trade necessity, dispensed with a joinder, and allowed partners, or joint traders, to sell or pledge each other's share, declaring that the Law Merchant was part of the Common law.[4] It follows, as the greater includes the less, that, being a joint proprietor, the partner's power to sell, which is the badge of dominion, carries with it the right to make any contract with reference to a sale, and that the correlative power to buy for a co-partner involves the right to contract for a purchase. Any contract, therefore, with reference to trade is within a partner's power.

1. *Partner may buy merchandise and bind co-partner for the price.* HOLT: "If there be two partners in trade, and one of them buys goods for them both, and the other dieth, the survivor may be charged by *indebitatus assumpsit* generally, without taking notice of the partnership, or that the other is dead and he survived. Hyat v. Hare, Comb. 383 (1609).

2. *Partner's sale is also his co-partner's.* A & B partners. A, by different contracts, sold merchandise to C, and sued him for balance due on the various contracts.—Suffered non-suit to avoid C's wager of law in debt. "And in this case it was agreed by the Court, that the sale by one partner is the sale of them both; and therefore although one of them selleth the goods, or merchandizeth with them, yet the action must be brought in both their names; and in such case the defendant shall not be received to wage his law, that the other partner did not

sell the goods unto him, as is supposed in the declaration." Lambert's Case, Godbolt, 339 (1614)

3. *Partner may borrow, and bind co-partner for loan by contract in form of commercial paper.* B & C partners. B borrowed money of A, and gave him a note signed B & C. A brought bill to charge C's estate.—Liable. Note charged both. Lane v. Williams, 2 Vern. 277 (1692).

"If there be three joint traders for the common stock and benefit of all three, and their factor draws a bill on them, the acceptance of one will oblige the residue of the company." Molloy, 279.

"If it (the bill of exchange) be on joint traders, the acceptance by one will conclude and bind the other." Ib. 279, 282.

"If there be two merchants or partners, and one of them accepts a bill of exchange, the same shall bind the other; and an action on the case on the custom may be maintained against him," Ib. 284.

4. Co. Litt., 11 b. note (m)

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§6.

If commercial paper had been confined to trade, the joinder of payees would have constituted them partners in the document.

At first, when commercial paper was used only as an instrument of trade, a joinder as payees was a joint act of trade, and was proof of a partnership in the document.[1] This ruling was displaced by the fact that commercial paper outgrew the limits of trade, on account of its convenience, passing, as it does, a claim from hand to hand, and making it the least of all contracts open to dispute. Being used by persons not engaged in trade on account of its availability, and no longer confined to trade, a joinder on commercial paper is not proof of a joint act in trade. A payee, therefore, could not, for instance, endorse for his co-payee.[2]

1. *Joint payees of a bill are partners in the instrument.* B & C drew a bill on D to their order, and C endorsed it to A, who sued D.—Judgment for A. Carvick v. Vickery. Douglas 653. (1781). Upon a second trial defendant proved that by a custom of London the endorsement was inadequate, and obtained a verdict.

The verdict established a local exception to the law. The exception has become the rule.

2. *The joint payee of a promissory note is not entitled to deal with it as a partner.* B & C made a promissory note for $1000, payable to E & F. E endorsed it in his own name, and, as attorney in fact for F, to G, who endorsed it over to A. He sued the makers. Plaintiff argued that payees were partners in the note, and that either was entitled to endorse it in the names of both; the endorsement by attorney being surplusage; that bill drawn by two to their order, and endorsed after acceptance by one of payees would have been sustained, except for custom of London, and endorsement by one payee of a bill was sufficient.—Non-suit. Joint payee no more power than joint owner of a horse. If endorsement of bill by one of payees before acceptance, the acceptor is estopped from denying payee's right, but no implication of partnership from the commercial instrument between the co-owners of it. Wood v. Wood, 1 Harr. 429. N J. (1838).

Nor does a joint endorsement by the payees make them partners. Joint endorsers not being partners, notice to one of protest is insufficient. Promissory note to B & C's order. Each joined in endorsing it to A. He sued notary, D, on his bond for failure to notify C of protest.—Judgment for D. Notice to B sufficient, as joint endorsement made them partners.—Reversed. Sayre v. Frick, 7 W. & S. 383. Pa. (1844); Shepard v. Hawley, 1 Conn, 367 (1815); Willis v. Green, 5 Hill 232. N. Y. (1843).

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§ 7.

The transformation of trade from its starting point, in the exchange of commodities, to its triumph in the commercial and industrial state, has made partnership co-extensive with business.

Is partnership still an organ of the trade, and are its functions defined by the nature of trade? If so, could a partnership be formed to do any business which did not consist of the double operation of buying and selling? Neither the act of buying[1] nor the act of selling,[2] apart from each other,[3] constitutes trade; both acts are required to complete the transaction. This is the primal type of trade.[5] Has there been no departure from the primitive notion of trade? Has not its scope been enlarged by the modern developement of commercial and industrial enterprise? Undoubtedly! trade has undergone a transformation.

The word 'business' indicates the extension which the notion has received. The original constituents of buying and selling need no longer co-exist in the business. There may be a partnership in manufacturing, which is not a trade, but an industry. A firm might manufacture in partnership, and sell the manufactured product on separate account. Each partner would become a debtor to the firm for the price of goods sold by him, and the ultimate profits would be divided between them.[6] In fact, neither buying nor selling need be an element of the partnership business. A capitalist, who furnished the means to erect a factory and stock it with machinery, would be a partner with the manufacturer, who contributed his skill and labor to manufacture the goods, although they should not be sold by the firm. The sales might be made by independent factors, and the raw product supplied by either partner, without affecting the relation of the partners in the manufacturing business.

1. *No partnership in buying.* A and four others, unconnected in business, made shipments abroad in one cargo. Return cargo to be divided among them in proportion to ownership of proceeds of outward cargo. A insured his quota in unvalued policy, and, on ascertainment of value, sued for excess of premium. Defence: that policy covered whole cargo as partnership property, in which A could have no separate insurable interest.—Association for buying merely, and not a partnership, because no joint sale contemplated. Holmes v. U. Ins. Co., 2 Johns. Cas. 329. N. Y. (1801).

An agreement to share merchandise bought by another, does not make the sharers partners. B, C & D agreed to take aliquot shares of goods which B should buy in his name. A, the seller, sued C & D, as partners, for the whole price.—Not liable, because no re-sale with a sharing of the profits, but a division of the merchandise among the buyers. The division is a sub-contract, not a joint purchase. Coope v. Eyre, 1 H. Bl. 39 (1788).

Qui nolunt inter se contendere, solent per nuntium emere in commune, quod a societate longe remotum est. D. 17, 2, 33.

A purchase in common not partnership. B, a merchant, at Leeds, who was in the habit of dealing with A, at Hamburgh, ordered a cargo of wheat on account of himself and C, and directed bills to be drawn upon each for his moiety. The correspondence described the adventure as joint. The cargo was shipped, and each took his half. B paid for his share, and A sued him for balance of price due from C,

who had become bankrupt.—Not C's partner, because no sharing of profit and loss, but a separate purchase by each. Gibson v. Lupton, 9 Bing. 297 (1832).

2. *All partners must join in action for goods sold and delivered. Joint sale a constituent of partnership.* A & B partners. B and C employed D to build a saw-mill, and made payments, with C's knowledge, in the goods of A & B. B charged them on the books to D. A & B dissolved, and B assigned firm claims to A, and promised to pay A whatever he owed D, but denied any indebtedness to D. A sued B & C in assumpsit.—No recovery in action against both. C's promise not absolute, and B's did not bind him as a partner, because no joint sale of mill contemplated, and B a necessary plaintiff on a count for goods sold and delivered. Porter v. McClure, 15 Wend. 187 N.Y. (1836).

3. *Purchase by broker, though joint, for undisclosed principals, with a right to pledge the goods and to sell each one's quota, does not make the purchasers partners.* B bought tea as a broker, at India Co.'s sales, for himself and for undisclosed principals, who also authorized him to sell. He pledged the warrants to A, for a loan. A sued C, a purchaser of 2-16, as a partner with B and the other purchasers.—Not a partner. Though the tea was sold by the Co., in a block, B bought for separate purchasers, and sold their quotas for them as individuals. The negotiation of the warrants was a pledge of the tea, but not of the owners' credit. Hoare v. Dawes, 1 Douglas 371 (1780).

4. *Buying and selling.* Judgment against A & B, as endorsers. Debtor indemnified them, by giving them salt. A sold the salt on joint account, and applied proceeds in discharge of judgment. He had given a note of A & B for freight to defendant, who transferred it to plaintiff, with guarantee of *collection* (not payment). Plaintiff never enforced payment, supposing B was not a partner, and hence not liable. B had since become insolvent. Plaintiff, to excuse laches, denied partnership.—B held a partner, because a joint purchase and agreement to share profit and loss of sale. Cumpston v. McNair, 1 Wend. 457. N. Y. (1828).

5. Handbuch des Handelsrechts von Dr. L. Goldschmidt, 1864. Bk. 2, Ch. 1, s. 41, p. 299.

6. *In manufacturing without selling.* A & B were joint owners of paper-mill, and partners in manufacture of paper. No sales made on joint account. Whatever sales were made by either partner, were on his separate account, and he became a debtor to firm for price; the profits were shared between them. A sold paper to C expressly on basis of arrangement, and sued him for price. Defence: Non-joinder of B.—Recovery, because partnership limited to manufacture and division of ultimate profits. Ensign v. Wands, 1 Johns. Cas. 171, N. Y. (1799).

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§8.

Land may be made an article of traffic, and a partnership formed for dealing in it as merchandise.

As the province of partnership is co-extensive with the area of business, where are its confines? Unless withdrawn from the will of man by the authority of tradition, there are no limits to the boundless tract which is open to his energy. Land was not, at the Common law, a natural subject of commerce, and if parties traded in land the buying and selling remained distinct acts, unconnected in spite of the intention to unite them in a single transaction, by reason of what Lord COKE calls the 'perdurability' of land.[1] The clod could not be moulded by man, but shattered his will to pieces. In plain English, land was withdrawn from trade under the Feudal regime, and the seclusion became, in time, a privilege of distinction. The spirit of trade, however, which levels all distinctions but money, is gradually affecting land, and bringing it into the market as an article of commerce. Tradition has yielded to the innovation, and a partnership may exist for dealing in land.[2]

1. *Buying and selling land did not constitute a partnership.* Association formed to buy and sell real estate. Two members acted as trustees, buying, selling and mortgaging in their own name, and executing declarations of trust to associates. Trustees bought of A, and gave him a mortgage and their own bond for the purchase-money. A brought bill in equity against other members as partners.—No partnership in buying and selling land, though there might be in farming or mining it. Sale on credit of trustees. If A ever had a claim against the members, he lost it by taking trustees' bond. Patterson v. Brewster, 4 Ed. Ch. 352, N. Y. (1844).

Trading in land no partnership. Speculators in land under articles, employed a book-keeper, who sued one occupying position of dormant partner, for salary. Defence: No partnership in land speculations.—Liable, without partnership, for services incidental to purchase and sale, on basis of joint ownership. Benners v. Harrison, 19 Barb. 53, N. Y. (1854).

A & B bought land of C on joint credit, to be paid for, in part, with strangers' promissory notes, which A & B were to endorse, if required. A endorsed A & B in partnership form. C endorsed to plaintiff, who sued A & B as partners.—B not liable, because not partner, but joint owner. Ballou v. Spencer, 4 Cowen 163, N. Y. (1825).

Goldschmidt's Handelsrecht, Bk. 2, Ch. 1, s. 41, pp. 310–12.

2. *Trading in land makes the traders partners.* B, C, and five others made a venture in buying and selling Western lands. C was purchasing agent. Deeds to be taken to B, as trustee, and payments made in drafts on B. Drafts not accepted. A sued the five for the purchase-money.—All liable, as partners, for the price of lands. Sage v. Sherman, 2 N. Y. 417 (1849).

Buying and selling land does constitute a partnership. A joint stock company was formed, to deal in land. The land was levied upon and sold by the separate creditor of a partner. The purchaser, with notice that the sale was made for a separate debt, was postponed to a subsequent purchaser, who bought the firm's interest. The partner's title was not a tenancy in common, but a contingent ownership of the stock and profits after a dissolution. Kramer v. Arthurs, 7 Barr. 165, Pa. (1847).

Partnership in buying land on joint account. Secret price to co-buyer for effecting sale at higher rate vitiates transaction. B, who owned a farm supposed to contain coal, arranged to give C an option to buy for the ostensible price of $85 per acre, but, at the same time, gave C a private option for $70. C induced A et al. to buy the farm with him. After the settlement, B returned C the difference between $70 and $85 per acre. A et al. sold half the tract, for an advance, to D. Coal was not, but the scheme of B and C was discovered. A et al. re-purchased the tract from D, and tendered the farm to B, in order to rescind the sale and reclaim the purchase-money.—Recovered the price and interest. Yeoman v. Lasley, 40 O. S. 190 (1883).

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§9.

The title to land, if not vested in the firm, is controlled by it, and the title-holder is its trustee.

Land does not, of course, pass, like merchandise, as a staple of commerce, or by a bill of sale. The obstacle, however, to dealing in land is merely formal. The title must be manifested by deed, and cannot be conveyed without the joinder of all the co-proprietors. The deed must, where statutes require it, be recorded; when creditors may rely upon the record-title. The partnership deals in land subject to the forms which regulate the disposition of real estate. But the prescribed forms do not prevent the title from being put in one, or all, of the partners,[1] or in a third person, for

the benefit of the firm; which, then, has the equitable title. The legal title is a mere instrument controlled by the firm, which may compel the trustee to act at its dictation.

Or the legal title may be vested directly in the firm.[2]

1. *Parol evidence competent to show firm title.* In the course of a building operation, partners in brickmaking traded houses, which they owned, for a lot, to improve. The title was taken in the name of one, and conveyed by him to a stranger, who created the mortgages, and he then conveyed to the other partner. The rents of the buildings were entered in the firm books. The first partner failed, and assigned for creditors in August, and the second in October. Parol evidence was admitted, to show that the firm owned the property, and the joint creditors availed themselves of the partners' equity, in order to exclude the separate creditors from the firm assets. Black v. Seipt, 34 L. I. 66. If the attempt was made to prove that the title in one partner was held as to a moiety for his co-partner, as a tenant in common, the evidence could surely be rebutted by proof that the title was held for the firm, for it is competent to establish title in the firm, independently of any counter-offer. Black's Appeal, 8 Nor. 201, Pa. (1879).

2. *Deed to partners trading as a firm puts the legal title in the firm.* Deed of land, made in 1870 to B, C & D, 'doing business under the style of B, C & Co.,' their heirs and assigns. Each signed, in 1872, judgment note to A, with the addition, 'doing business under the style of B, C & Co.' Deed recorded in 1874. Subsequently lots sold to E et al. A brought sci. fa. to revive judgment.—Revived. Terre-tenants took subject to lien against firm property. Lauffer v. Cavett, 6 Nor. 479, Pa. (1878).

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§10.

The Statute of Frauds does not interfere with a partnership in land, but does prevent the enforcement of an oral agreement between partners to deal in land, so long as the contract is executory.

The Statute prohibits dealing in land, except by a writing; and since partnership may arise from an oral contract, the Statute operates as a restriction upon the formation of a partnership for trading in land. The obvious application of the Statute is to the con-

tract between vendor and vendee; but in a partnership to buy and sell land a further question arises: Does the Statute also apply to the agreement between the joint purchasers? The vendor, in a written contract, may seek by oral proof to enforce the contract of sale against the partner of the vendee,[1] or, under like circumstances, the vendee's partner may seek by oral proof to avail himself of the written contract, and to compel a conveyance from the vendor.[2] So long as the contract between the vendee and his partner is executory, both of these cases are within the purview of the Statute. Should the partner who was not named in the contract of sale assert his interest in the land, by a suit against his co-partner, the vendee, the right to recover depends upon the payment of his contribution.[3] If it has been paid, the vendee becomes a trustee for the plaintiff to the extent of his interest.[4] If the contribution is partially paid, the plaintiff recovers an interest proportionate to his payment.[5] If the vendee sues his partner for the whole contribution, or for an unpaid balance, the defendant is not liable without a writing.[6] This principle of a resulting trust arising out of an executed contract between the partners, that is to say, out of the payment by one partner of his contribution for the price of the land, underlies the rule, subsequently discussed (Part II, Ch. VII), that whoever holds title to land purchased with firm funds becomes a trustee for the firm. It follows, therefore, that wherever the partner who was not named in the contract of sale, has a complete remedy against the vendee, he may enforce the firm title in an action against the vendor, although the partnership relation is proved by oral testimony. On the other hand,

whenever an oral partnership in land has been fully executed, the members of the firm incur all the liabilities, and acquire all the rights, of partners.[7]

An oral agreement by the owner of land, to take a partner and admit him to an interest in the land, is within the Statute, although the purchase-money may have been paid in part, and the firm business conducted on the land. The possession of the partner vendee is not exclusive of his vendor, and is ambiguous, because he may be on the land not as owner, but merely to take part in the firm business.[8]

Where an agent, appointed to purchase land, takes the title in his own name, will he be treated as a trustee for the principal? Upon this question the authorities divide. It has been held, on the one hand, that the agent does not become a trustee, unless he bought the land with the money of his principal. On the other hand, it has been decided that a trust arises by operation of law from the violation of confidence, even where the agent paid for the land with his own funds.[9] This question does not arise between partners. Conceding the correctness of the view last stated, the doctrine of agency can not be invoked to force the vendee of land to admit another as his partner in the purchase. The vendee is himself a principal, and his agency for his partner does not commence until after the formation of the partnership. The undertaking rests entirely on contract, and the vendee's refusal to admit his alleged partner to share the title with him is nothing more than a refusal to enter into partnership with him.[10]

Where no effort is made to assert title to any land, but the contention arises between the partners over

the distribution of the proceeds of land bought and sold on joint account under an oral partnership, the Statute of Frauds has no application.[11]

1. *Vendor has no recourse against vendee's co-purchasers under an oral contract to buy and sell land on joint account.* B orally agreed with C & D to buy and sell land, he to contribute half the capital, and they each a quarter, and to share the profits in the same proportion: D to take title and give his bond and mortgage for the unpaid purchase-money, which he did, with B and C's authority and consent; each paid his quota of the cash consideration and of interest on the bond. Mortgagee foreclosed, and proceeds being insufficient to pay the debt, recovered judgment against C for the deficiency.—Judgment reversed. Williams v. Gillies, 75 N. Y. 197 (1878).

Suppose the defendant had paid his part of the purchase-money to his partner, the vendee, would the defendant have been liable for an unpaid balance of the price resulting from the failure of the vendee either to pay up his contribution in full or to pay over to the vendor the contribution received from the defendant, on the ground that as the contract of partnership had been executed as to the defendant, he incurred the liability of a partner, and became responsible for the price of the land bought on behalf of the firm? The defendant, it seems, would not be liable, because the partnership in land is always specific, that is, a partnership in a particular transaction. And a partner's obligation for the price of the land will not exceed the liability of a co-purchaser. The purchase not being joint in form, the partner is liable only for his quota, and he is not liable to the vendor for that, because he is not a party to the written contract of sale. His only obligation was to his partner, the vendee, and that has been discharged. A purchase of the land complete in all its parts is preliminary to the establishment of an oral partnership, with its attendant responsibilities, and the attempt to charge the defendant by oral proof for any portion of the price would forestall the relation.

2. *A partner, having paid his contribution, may compel the vendor of his co-partner to convey to the firm.* A & B formed a partnership to buy land, erect a mill, and carry on the business of sawing lumber. B, as his contribution, bought the lot in his own name for $300; by written contract, paid $100 on account, and gave his own notes for the balance. They took possession, and A put up the mill, worth $1500, as his contribution. They continued the business until B died. Then A took up B's notes, and brought a bill against the vendor and B's representatives for a conveyance to himself and the representatives of B.—Decree. The payment by B was made with funds de-

voted to firm purposes, although never actually in the firm treasury. Scruggs v. Russell, McCahon 39, U. S. C. C. (1858).

3. *Oral contract to buy land in common not binding if executory.* B agreed, orally with A, to bid at public sale for land, take title to them in common, advance the cash payment required by terms of sale; and A agreed to repay B his quota of cash advanced, and join with him in the bond and mortgage for balance. B took title in his name. A tendered payment, and, upon B's refusal to convey a moiety, demanded specific performance. Defence: Statute of Frauds.—No partnership, but agreement for joint purchase. No trust resulted to A, because contract executory. Levy v. Brush, 45 N. Y. 589 (1871).

4. *Trust results to partner on oral contract of partnership in land, when executed.* A & B agreed, orally, to buy and sell farms in partnership. Without A's knowledge, B took title to a farm. Subsequently, A paid his share of the price and improvements, and both treated the farm as joint property. Upon discovery that title was not in both, A called for a conveyance of his moiety. Defence: Agreement void by Statute of Frauds, and, if a valid partnership, remedy, account.—Trust resulted to A on executed contract of partnership. Account unnecessary. Traphagen v. Burt, 67 N. Y. 30 (1876).

5. *A trust arises upon a partial payment of the consideration.* B & C bought land, each orally agreeing to pay half the purchase-money, $500. Deed made to B. C paid $75 on account, and balance paid by B, who conveyed to A to reimburse himself the advance. A brought ejectment against C's tenant.—Recovered, because C did not tender balance of his purchase-money, or ask for conditional verdict. C's part-payment raised a trust, independent of B's breach of contract, and gave him an equitable title, which corresponded to his payment. Chadwick v. Felt, 11 Ca. 305, Pa. (1860).

Unless the State decrees, as Michigan has done, that a trust shall not result from payment of the consideration:

"When a grant for a valuable consideration shall be made to one "person, and the consideration therefor shall be paid by another, no "use or trust shall result in favor of the person by whom such pay-"ment shall be made; but the title shall vest in the person named as "alienee in such conveyance." Gen. Stats. of Michigan, s. 5569.

Trust does not result to vendee's partner who pays part of the price. A brought account against B for a share of the profits made by the purchase and sale of a lot, averring an oral contract, by which each should pay half the purchase-money and share the profits equally. The conveyance made to B, who furnished most of the money. A contributed but a small portion.—Dismissed. Michigan Statute prevents a trust from resulting from part payment of the price. Pulford v. Morton, 28 N. W. R. 716, Mich. (1886).

A sued B for breach of trust on oral contract to buy timber-land, and to manufacture aud sell lumber. A agreed to select land, B to buy them, put title to 1-3 in A and to take 2-3; A to re-imburse B 1-3 the purchase-money, by sawing a given amount of timber at a specified rate. B bought for himself. A averred performance of his part. Defence: Statute of Frauds.—Contract void. Raub v. Smith, 28 N. W. R. 676, Mich. (1866).

6. *No action for contribution under oral contract to deal in land.* A & B buy land. A sues C for quota of price, offering oral agreement, to the effect that A & B were to buy the land for A, B & C, and divide

the profits of a sale as partners.—B an incompetent witness. Since C could not enforce the contract against A & B, they could not make him contribute. They could not say: "Heads we win; tails you lose." Meason v. Kaine, 13 Sm. 335, Pa. (1869).

7. *Land bought and sold under an oral contract of partnership charges the partners, irrespective of title and the Statute of Frauds.* B, C & D agreed, orally, in September, to buy and sell land in B's name, on joint account. They purchased land in October, and reduced the agreement to writing in November. In December B sold to A, as oil-producing, land on which he had, with C's knowledge, poured petroleum, in order to deceive A. D was ignorant of the scheme. A brought action against B, C & D for deceit. D's defence: No partnership in land, at least, without a writing; hence not liable for co-speculator's fraud.—Liable. Partnership in land differs from partnership in merchandise only in mode of conveying title. The Statute of Frauds does not exclude proof of an interest in land already bought under an oral agreement. Chester v. Dickerson, 54 N. Y. 1 (1873).

Dealing in land under an oral contract of partnership gives a partner title, without reference to the Statute of Frauds. B, C and D, trading as D & Co., owned mills, which, with adjoining land, they used in the business. By oral agreement A, in 1875, joined the firm, and his 1-4 interest in firm property, estimated at $12,000, was entered on the books. A acted as a partner in transacting the firm business until 1882, when his co-partners excluded him. He brought account against B, C and D for his share of the firm property, which had increased to $30,000. Demurrer on account of Statute of Frauds.—Decree. The oral contract having been carried out, A became a partner, and shared the real estate of the firm, no matter who held the legal title. Marsh v. Davis, 33 Rand. 326, Kan. (1885).

8. *Possession by vendee, under oral contract of partnership with vendor, insufficient to satisfy Statute of Frauds.* D, the owner of land, orally agreed to take B and C into partnership in consideration of $6,700 for their two-thirds, $2,000 cash, balance payable out of the profits. Cash paid, and B and C went into possession with D. The firm built a saw-mill, and made other improvements on the land for the lumber business. A claimed, as separate creditor of D, a lien paramount to firm creditors.—Judgment against D bound the title. Statute of Frauds prevents a transfer of title to the firm. B and C's entering into possession did not exclude D, and was not equivalent to the feudal investiture for which the Statute makes writing a substitute. The possession might be for a purpose apart from the purchase; for example, to conduct business on the land, which would explain the possession to the neighborhood. McCormick's Appeal, 7 Smith 54, Pa. (1868).

9. *A trust results to principal from agent's violation of confidence.* A employed B to purchase a lot. B entered into negotiation with the owner and bought the lot for himself, with his own money, and took title in his own name. A brought ejectment. Defence: Statute of Frauds.—Recovered. Trust arises, by operation of law, from the violation of confidence, without payment of the consideration. Rose v. Hayden, 35 Rand. 106 (1886).

10. *An oral partnership, to deal in land without payment of contribution, does not constitute the vendee a trustee for his partner.* A brought a bill against B, alleging an oral partnership to buy and sell land and lumber; B to take title and sell on joint account, the payment by A of certain sums by way of contribution, asked for an

account of previous sales and the conveyance to him of his share in such lands as remained unsold. B denied the partnership, treated the advances as loans, and set up the Statute of Frauds.—Dismissed. The fact of an oral partnership is not clearly established, and certainly there was no partnership fund, but the Statute is a bar in any event. An oral partnership for the purchase and sale of lands on joint account is clearly the case of an oral contract respecting an interest in lands, and is invalid under the Statute as a conveyance, contract or trust, unless it be a trust arising or resulting by implication or construction of law. It is not the case of an estate created in lands, but rather of a declaration or creation of a trust, or confidence in lands not arising or resulting by implication or operation of law. This trust arises on the purchase, if at all, and it arises directly *ex contractu*, and not by operation of law. To this latter result it is necessary that the plaintiff, 1, shall have paid the price, or, 2, have owned the funds, either in whole or in part, from which the purchase-money was taken. The first is the case of an agent, the second is the case of a purchase with firm or trust funds. Or there must have been some fraud. The lands were not purchased with firm funds, for there were no funds; there was no fraud, but a violation of a promise, and the alleged partner can not be charged as an agent who has violated the trust reposed in him, because the plaintiff paid no portion of the price. Even if an agent could be made a trustee when he has bought with his own money land which he orally agreed to purchase for his principal, it would be a case distinguishable from the present, because the defendant made the purchase as a co-principal, and properly in his own name. The plaintiff cannot avoid the Statute by defining the alleged partnership as a contract to share the profits made by dealing in land, and not as a contract for an interest in the land itself. The profits are an increment to the partnership fund, and pre-suppose an interest in the land. Smith v. Burnham, 3 Sumner 435, U. S. C. C. (1838).

Fall River Whaling Co. v. Borden, 10 Cush. 458, Mass. (1852).

11. *Oral partnership and real estate as assets.* A & B agreed, orally, to buy a foundry site, erect buildings, and carry on the business. Each paid in his contribution in full, and B took title to the land. The land was sold, and the firm dissolved. A brought bill for an account, and enjoined B from disposing of the firm assets. B moved to dissolve injunction, on the ground that as the partnership contemplated the purchase of real estate it was invalid, because oral.—Motion refused. Smith v. Tarlton, 2 Barb. Ch. 336 (1847).

A contract to divide the profits arising from a sale of land is not prohibited by the Statute. B, in 1866, advanced C $250 to buy a tract of land, upon his oral agreement to divide the profits of a sale between them. C gave his note for the loan, and mortgaged the tract as security. In consideration for a re-conveyance of part, B, in 1868, relinquished his claim for profits. In 1872, B and C submitted their accounts to an arbitrator, and he awarded B $96. A, et al., terre-tenants of land not re-conveyed, brought bill against B. Claim: 1, Loan, including principal, interest and profits, usurious; 2, Statute of Frauds; 3, Reduction of debt enured to plaintiffs.—Judgment for B. Contract not within Statute of Frauds. Mahagan v. Mead, 63 N. H. 130 (1884).

A sued B & C on oral contract for 1-3 profits of land purchased and sold by them. Defence: Statute of Frauds.—Recovered. Performance waives the Statute. Trowbridge v. Wetherbee, 11 Allen 361, Mass. (1865).

Oral contract for proceeds or product of land not affected by Statute. A and B agreed, orally, to cultivate a farm and to buy and sell land in partnership, sharing the profit and loss equally. A brought a bill for half the profits of the farm, and of the real estate transactions. Defence: Statute of Frauds.—Decree for a share of profits made by real estate operations, because land converted and claim for proceeds, which were personal property; for a share of profits made in cultivating the farm, because the title to land was not involved in the issue. Everhart's Appeal, 10 Out. 349, Pa. (1884).

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§11.

Partnership may exist for improving, as well as for buying and selling, land.

The business may consist of a building operation, undertaken for the improvement of land, and for bringing it into the market by means of the structures erected upon it;[1] or the business may be limited to the erection of buildings, without any ulterior view of selling the premises.[2]

1. *A building operation on joint account is a partnership.* Land was let to B, who conducted a building operation. C advanced the money. Title held by C, though in equity tenant in common with B. Funds realized by sale of houses deposited to joint credit, upon which either entitled to draw. After advances and outlays reimbursed, profit and loss divided equally between B & C. A sued C for building materials.—Liable, because transaction was by B as C's agent on behalf of both. Noakes v. Barlow, 26 L. T. 136, s. c.; 20 W. R. 388 (1872).

The title belongs to the firm. B & C were partners in brick-making. They traded two lots held by them in common, and two in severalty, for a lot which was conveyed to B for a building operation. He put title in D, who executed mortgages and conveyed to C. The mortgages were never negotiated. B assigned for creditors, to A, and C subsequently assigned for creditors, to E. A sought to make E reconvey a moiety, on the theory of a tenancy in common by B & C. E offered to show, by parol, that land belonged to the firm.—Evidence admitted, because contest between partners. Black's Appeal, 8 Nor. 201, Pa. (1879).

2. *A partnership in building.* A & B were associated for building, but not for operating, a mill. A bought mill-stones for firm, on individual credit. Plaintiff sued both for price.—Recovered, because partnership in building, and purchase incident to business. Reynolds v. Cleveland, 4 Cowen 282 (1825).

§12.

The only close left which business does not penetrate is farm land.

The relic which survives of the traditionary epoch is the custom of farming on shares. The relation of landlord and tenant gives expression to agricultural habits, which would not, it was thought, adapt themselves to the transactions of business men.[1] But the exception is becoming rather a presumption of fact than a dogma of law, and if the parties mean to farm land in partnership, the law will not prevent them.[2]

Farming on shares does not constitute an agricultural partnership, but establishes the relation of landlord and tenant, according to inveterate tradition.

1. *Farming on shares no partnership.* By agreement, B farmed land of A for 1-2 the product, each furnishing 1-2 the stock, but B the implements, working-stock and labor, and also paying road-tax and 1-2 of other taxes. B confessed judgment to C, who levied on and sold B's interest in the farm to D. Claim of A's devisee: Sheriff's vendee bought only balance due B after account with A.—Judgment for C. No partnership, and A's failure to distrain, or notify sheriff of claim for rent, devested his right. Brown v. Jaquette, 13 Norris 113, Pa. (1880).

A rented B a farm for 1-2 produce, and a tavern for 1-2 profits, and sued for use and occupation.—Action lay, as agreement created no partnership. Perrine v. Hankinson, 6 Hal. 181 (1829).

B, who owned a farm, furnished and provided for the horses, C for the laborers employed to raise tobacco, for half the produce. C sold the crops to A, who sued B and C for its non-delivery.—Judgment for A reversed. No partnership. Day v. Stevens, 88 N. C. 79 (1883).

Working farm on shares no partnership. A covenanted with B to work his farm for 1-2 the crop. A brought covenant. Defence: A, partner, and should have brought account.—A was a servant, neither tenant, tenant in common, nor partner. Patton v. Heustis, 2 Dutch. 293 (1857).

Farming on shares no partnership, although agreement to share profit and loss. A & B let farm partially stocked to C, sharing specified products and profit and loss. A & B sued C for their share. Defence: Account necessary. On trial, question put to defendant: 'What was general result, profit or loss?'—Question immaterial, notwithstanding agreement. Plaintiffs entitled to a share of produce. Gregory v. Brooks, 1 Hun 404 (1874).

The tenant is entitled to the possession during the term of his lease.

Farming on shares gives farmer possession. B let moiety of a farm for one year to A, who agreed to haul and spread manure, and keep

the fences in repair, to plant fields with specified seeds, and to pay taxes. B bargained for half the corn and grain, and A for all the hay and for pasturage. A sued B for failure to give possession.—Recovered. Steel v. Frick, 6 Sm. 172, Pa. (1867).

Title to the crop is incident to the possession, and is vested in the tenant.

Owner no title to crop until set apart. B rented his farm on shares to C et al. A attached the growing grain in their possession for B's debt.—Valid. No levy until rent in kind set apart for B, but attachment lay for it against tenants, as owners. Howard v. Kyte, 28 N. W. R. 609 (1886).

The interest of the landlord in the growing crop is not severed by execution and sale under a judgment against him.

Execution against the landlord does not sever the crop. B let his farm on shares to C from year to year. During the term, the growing grain was sold under a judgment against B to A. Subsequently the land was levied on, and sold to D. C, as tenant of D, delivered to him the harvested grain. A sued D.—Recovered. Levy severed the shares, and sale passed B's share to A.—Reversed. Long v. Seavers, 7 Out. 517, Pa. (1883).

A cropper shares the product, but, as he is not a tenant, he has no right to the possession, which remains in the owner, and he acquires no title to the crop.

A cropper has no way-going crop. B agreed with C that he should put out 25 or 30 acres in wheat, and have 2-3 of the crop. The farm was sold by the sheriff to A, who, in January, sold it to D, and subsequently entered up judgment for the purchase-money. C paid D 1-3 of the crop, and retained 2-3 of it. D claimed to set-off the 2-3 against A's judgment.—Disallowed. As C not a tenant, but only a cropper, there was no way-going crop for C to claim, or D to set-off. Adams v. McKesson, 3 Smith 81, Pa. (1866).

Cropper has only a claim for his share. B, who held land, bargained to plow and sow, A to fence and irrigate it, and to harvest the crop on shares. Upon disagreement, B cut off water, took charge of crop, and promised to pay A $10 a ton for his half; for which A sued B. Demurrer, because remedy account.—A simply a cropper, who had no interest in land, but a share of crop for his work. Romero v. Dalton, 11 Pac. R. 863 (1886).

In Massachusetts, and in New York, the disposition is to treat the farmer on shares neither as a tenant nor as a cropper, but as a co-occupant, with an undivided share of the crops and a qualified interest in the land.

Farming on shares gives the farmer a joint title to the crop. By agreement, B should work A's farm on shares for one year, each furnishing half the seed. A's creditor attached and removed his quota. A sued B for half the crop.—Judgment for B. Though remedy against officer by both co-occupants, who had undivided shares of the crop, yet the duty to act was upon A, because the trespass was committed for his private debt. His neglect waived pursuit of the officer for the trespass, and for recovery of the quota. Walker v. Fitts, 24 Pick. 191 (1837).

Available against his co-occupant, owner of the land. Agreement by A and B to farm on shares, each furnishing half the seed and manure, A doing hand and B team work, and A harvesting the crop. B excluded A, and consumed the crop. A sued B for the conversion. —Recovered. Tenants in common of the crop, and trover lies, in Massachusetts, against co-tenant for conversion of undivided half. Delaney v. Root, 99 Mass. 546 (1868).

Owners, occupants and laborers, farming on shares, are tenants in common of products, and may join in suit for price. C & D took A & B's farm on shares. D divided his share with E & F, in consideration for working the farm. D sold wheat, and all six sued for the price. Defence: Contract with D alone.—Suit maintained. Though not partners, owners tenants in common with occupants and laborers of products. As all must join in tort to common property, they may waive the tort and sue in assumpsit. Putnam v. Wise, 1 Hill 234 N. Y. (1841).

Until or unless a division is made.

The agreement may provide for a division, and exclude a joint interest. Agreement: A to work B's dairy farms, deliver 9,600 pounds, and retain the residue of cheese manufactured and sold by the factory. A sued D, its treasurer, for proceeds he had paid B.—Judgment for D. Title to first 9,600 pounds manufactured in A; balance only in B. Wilber v. Sisson, 54 N. Y. 121 (1873). Or the value of a share may be bargained for, and that indicates a cropper. Tanner v. Hills, 48 N. Y. 662 (1872.)

2. *Farming on shares by owners constitutes a partnership.* A & B jointly bought lands, for the purpose of farming them, and eventually of selling them. By subsequent agreement, A conducted the farming operations, and B attended to the sale and shipment of produce, bearing equally the expenses, and after an allowance to A for his services, and for the use of his teams and implements, sharing equally the net proceeds. A sued B for his portion.—Judgment for B. Partners, and only remedy account. Fisher v. Sweet, 67 Cal. 228 (1885).

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§13.

It is the act of the parties, and not of the law, which makes land an article of trade.

The conversion of land into merchandise is a positive act, which must be performed by the parties who wish to effect the transformation. The land retains its natural state until some act is done which changes the normal condition, and converts it into merchandise. The law does not work the effect of its own

motion, but follows in the wake of the parties, and ratifies their act when it is an accomplished fact.[1]

At first, mutual covenants by the partners were required, in order to convert the land into merchandise.[2] But the intention is now sufficient.[3]

1. *Owners of land, mill and machinery are tenants in common, unless they intended to use or sell the plant as partners.* A, B and C agreed to jointly buy and hold land, erect a steam saw-mill, and equip it with machinery. They agreed to share equally the profits, either of selling or letting the plant, and to reimburse any over-advance by either. B died, and A brought bill for account and over-advance.—Decree. Lien enforced upon the contract, but parties co-tenants, not partners. Farrand v. Gleason, 56 Vt. 633 (1884).

This is also the Civil Law: "Supposons que deux personnes se "sont réunies pour acheter un immeuble: seront-elles en état de so-"ciété ou de communauté? Pour résoudre la question, on doit cher-"cher le but que se sont proposé les parties. Est-ce pour revendre et "faire un bénéfice qu'elles ont acheté? C'est une société qui exist "entre elles. Mais dans le doute sur leur intention, la présomption "de communanté doit l'emporter." Traité des Sociétés Civiles et Commerciales, par A. Vavasseur, s. 28, 2d ed., Paris, 1878.

2. *Partners would hold real estate as tenants in common.* A & B were partners in working a distillery, which they owned. They sold the premises, and B recovered the price. A's representatives brought assumpsit for his quota. Defence: Should have brought account.—Recovered, because partners are tenants in common of real estate, which could be devoted to the firm purposes only by means of mutual covenants. Coles v. Coles, 15 Johns. 159 (1818).

3 *Title to firm real estate.* Partnership held land. No mutual covenants, but intention to use it for firm purposes. A died, and B assigned for firm creditors. Land sold on mortgages executed by the partners. Wife of A joined in the mortgages. The surplus was claimed by assignee, and by A's heir, and by his widow.—Widow allowed dower in a moiety, though husband had a two-thirds interest in the firm. Each partner's title was subject to a co-partner's equity, but proceeds remained realty, and hence widow took dower. Smith v. Jackson, 2 Ed. Ch. 28 (1833).

Intention of partners sufficient to put title in firm A, B, C & D, co-partners, bought land, but D took title in his name. A, B and representatives of C claimed purparts.—Recovered. Purchase by firm makes land its assets. Fairchild v. Fairchild, 64 N. Y. 471 (1878).

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§15.

But a modification is to be noted, which results from an extension of the partnership area.

The principles which grow out of trade and regulate its transactions undergo a change when partnership, an organ of trade, is extended to a business which is not a trade, and does not consist of buying and selling merchandise.

The extension of partnership to all branches of business has led to the recognition of a new class, styled, by way of contrast, non-commercial partnerships. Their powers are defined by the special business undertaken by the firm, and not by trade.[1]

1. *Sheep-raising is inconsistent with partner's agency to sell.* A & B were partners in sheep-raising. B, during A's absence, and without his consent, sold out the ranch to defendants, but subsequently induced them to restrict the sale to 1-3 of the flock. B died, and A sued to recover possession of the sheep.—Recovered. Sheep-breeding involved no authority by a partner to sell. The business of increasing and improving the stock would be destroyed by a sale. The only purchases incident to the business are of breeding sheep, and the only sales of culls. Blaker v. Sands, 29 Kan. 551 (1883).

Theatre business does not justify commercial paper. B & C, partners for conducting a theatre. Without C's knowledge, B gave firm note for a loan, to D, who endorsed it to A. A knew the business was not for trade. The note being given shortly after the partnership was formed, no custom was established of the firm's giving notes. The proceeds were not traced beyond B, and no firm necessity was shown for the note. A sued firm.—Judgment for plaintiff set aside. Presumption against partner's authority to make commercial paper in non-trading partnership. Each partner is not general agent for firm, except in a commercial partnership. *Semble:* Firm bound if it received proceeds. Pease v. Cole, 53 Conn. 53 (1885).

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§15.

A mining partnership forms a distinct species. In it there is no *delectus personae*, but a share invests the holder with membership, even against the will of his co-partners. Neither the death of a partner nor the assignment of his share dissolves the firm.[1]

The partnership results from a co-operation in the working of a mine, whether it is owned by the firm,

by the partners as tenants in common, or by third persons who make leases to the firm.[2] The nature of mining property, and the requirements for its developement, led to the abandonment of contract as the basis for the relation. Mining operations demand uninterrupted exertions, and would be imperilled if a dissolution of the firm resulted from a change of partners. Moreover, the amount of capital required to undertake and conduct extended works furnished an additional reason why the firm should not depend for its existence upon the mutual contract of its constituents.[3]

The personal confidence which, in ordinary partnership, results from the choice made by the partners of their associates does not exist in a mining partnership, where the connection with each other is only through the common business. Each partner represents the business, but he does not represent his copartners, and his implied authority is defined by the nature and necessities of the business.[4] His liability springs from the same source.[5]

The normal type of partnership, however, reverts, and will exist in a mining business, if there is a *delectus personae.*[6]

1. 11 Morrison's Mining Rep. 223-607.
Partners by purchase, right to assets. Superintendent of mining partnership bought for its hydraulic diggings ditches upon which A had a lien. Of original partners, some died, and all the others, except B, were succeeded by A et al., who knew that purchase-money was unpaid when they purchased shares. A brought account. Defence: B survivor, aud retired partners not joined.—Decree. No dissolution by death, or substitution of partners. Retired partners not necessary parties. Jones v. Clark, 42 Cal. 180 (1871).
Share-holder a partner in mining firm. B bought out an original partner, who had 1-16 interest in a mining partnership, and sold 1-2 to C. Neither was known as a partner in the business, or took part in its management. A erected a rock-crushing mill under contract with the firm, and sued B & C for contract price.—Recovered. Holder of share a partner in mining firm, although he is not held out, and

takes no part in managing the business. Taylor v. Castle, 42 Cal. 367 (1871).

2. *Partner has lien for advances made in working mines.* A bought out the interests of 5 who, with B, worked mining property. The firm bought with its funds other mining land and a ditch to supply the works with water. There was no contract of partnership, but the profits and losses were shared according to the interests. The firm incurred debt by constructing a tunnel. Account showed B indebted to A $1,572.55. B, insolvent, sold his 1-5 to C and D, informing C, but not D, of A's claim.—C and D took subject to A's lien. Duryea v. Burt, 28 Cal. 569 (1865).

3. *Receiver appointed only upon interference.* A & B, solicitors in partnership, bought part of a coal mine, and worked the colliery. Upon a disagreement, A, while actually conducting the operations, brought a bill for account and for the appointment of a receiver.—Dismissed. No such interference as broke up the business. The refusal of partners to co-operate is like the disagreement in an ordinary partnership, but there must be such an interference by a partner as prevents a continuance of the business, in order to justify a court in undertaking its management. Roberts v. Eberhardt, 1 Kay 148 (1853).

4. *The partner is not an agent to bind the firm by commercial paper.* Under the facts, B was appointed agent by one of the proprietors, to erect a smelter and carry on smelting works for the association. A sold coal for the business, and sued the members as partners.—Recovered. A mining partnership results from the co-operation of owners in working a mine. The partner has authority to do acts necessary or usual in transacting such business, though not to make commercial paper, or employ counsel to litigate the title to a mine. Share may be assigned to stranger without consent of co-partners, and firm not dissolved by a partner's death. Higgins v. Armstrong, 10 Pac. Rep. 232, Col. (1886).

Mining firm's pre-emption right of retiring partner's interest does not prevent him from selling his title, if the mines are owned by the partners, and not by the firm. A, B, C & D, each owned one-fourth of two lead mines. While A and B were negotiating for the firm to buy out D, B and C closed with D, and took his title for themselves. A discovering the purchase, claimed for the firm the proceeds deposited in bank.—Judgment for B and C. B not a trustee, as he repudiated agency, and bought for himself with his own funds. Mining firm's right of pre-emption is confined to retiring partner's interest in firm property, and does not extend to his individual title. The partnership for working the mines did not include the ownership of the property. First Nat. Bank v. Bissell, 2 McCrary 73, U. S. C. C. Affirmed, s. c., Bissell v. Foss, 114 U. S. 252 (1885).

A partner's authority in a mining partnership is defined by requirements of the business. B, C, et al., partners in mining. Articles authorized purchase and sale of lands, or leases, but prohibited any partner from contracting any debt without consent of his co-partners. B drew on C, in favor of A for purchase-money of mineral land. C refused to accept, and A sued.—Judgment for C. Authority to borrow by commercial paper necessary for a trading, but not for a non-trading partnership. Judge v. Braswell, 13 Bush. 67, Ky. (1887).

5. *Partnership in working quarry. Partner liable for tort of co-partner's employees.* B owned a quarry, shipped and sold the stone. C worked the quarry, and his men assisted B's men in loading. B & C

paid for blasting powder, and divided profits in equal parts. C's men injured A on adjoining premises, by negligent blasting, and A sued B.—Recovered. B & C partners. Cotter v. Bettner, 1 Bosw. 490, N. Y. (1857).

6. *Mining does not differ from trading partnership if a delectus personae.* B, a practical miner, contributed his skill, and C the money, with which they bought and worked a mine. A sued firm on its note made by B for, and used in, the business.—Recovered. Ordinary partnership, though for mining. *Delectus personae.* Decker v. Howell, 42 Cal. 636 (1872).

CHAPTER II.

THE ANTECEDENTS OF A PARTNERSHIP.

§16.

The object of trade, and also of partnership as an instrument of trade, is gain, and unless a business is undertaken there can be no partnership.[1]

Gain means a positive acquisition of property. Mutual protection against loss does not add any new product, but simply provides security for retaining what is already possessed. A mutual protection, or mutual insurance, association does not amount to a partnership.[2] As STRACCHA puts it: "Assecuratus "non quaeret lucrum, sed agit ne in damno sit."[3] Nor does a tontine involve a partnership as the agent of production. The right to succeed upon the death of a member to his share does not result in a gain, but in a division among the contributors of the fund, which they possessed at the beginning.[4] But insurance may

be carried on as a business, and then a partnership would result from the undertaking, unless the insurers organized as a corporation,[5] for any business undertaken for gain is a partnership, unless transacted under a corporate franchise.[6]

The French law does not limit the partnership to the profits made in a business, but enlarges the scope of the relation, so that it comprehends any association producing a benefit which can be estimated in money.[a] The pleasure and advantage derived by the citizens from frequenting a park would be sufficient, it is said, to make them partners in buying it, the value of recreation being equivalent to money.[b] The Commercial Code, however, regulates the affairs of business, and hence arises the distinction which is made between Civil and Commercial partnerships.

The authors of the Code Napoleon adopted the definition given by FELICIUS of a partnership:[c] "*Societas est contractus qui consensu, rebus, vel operibus, vel industria interventientibus, ad communem quaestum, seu lucrum, perficitur.*"[d]

1. *Club for mutual benefit, though possessed of property, is not a partnership.* Independent order of 'Rechabites,' organized as the 'Washington Tent,' for temperance, justice, relief in sickness, and observance of obsequies. The association acquired $4,600. A, alleging disagreement and practical exclusion of members, accompanied by diversion of funds, but not averring that he had first appealed, as required by the Constitution, to the 'High Chief Ruler,' or to the 'High Tent,' moved to dissolve the association, although its By-Laws forbade a dissolution while ten members remained, unless by unanimous consent.—Motion refused. Association not a partnership, because not for gain, and property merely an incident to the main purpose. Lafond v. Deems, 81 N. Y. 507 (1880).

An association, which is not for gain, is no partnership, and plaintiff need not join representatives of deceased's joint obligor. Lodge of Ancient Masons appointed committee, B, to provide for erection of a temple. B obtained loans on sealed certificates of the Lodge, which had never before issued them, except to attest membership or to communicate with other lodges. B reported proceedings to Lodge, which approved his course. Temple was constructed. Lodge occupied a third floor room, and rented out the rest of the building. A, who lent $100, brought assumpsit against over a hundred members, as partners, on a certificate. On trial A testified as to the loan, and examined defendants.—Verdict for A set aside. Association no partnership, because not for gain. No members except

those who authorized the construction were liable to A. He was competent, because Act 25 May, 1878, P. L. 153, equitably extends to joint debtors, and Act 22 March, 1861, P. L. 186, don't require substitution of deceased member's representatives, and therefore liability only of survivors at issue. A might prove his case by defendants under Act 27 March, 1865, P. L. 38. Ash v. Guie, 1 Out. 493, Pa. (1881).

Association, unless for gain, not a partnership. A, one of twenty Christian converts associated to promote spiritual and mental development, was convicted under 31 and 32 Vic. c. 116, s. 1, for embezzling the "partnership" funds.—Conviction reversed. Association not a partnership, because not for gain. Queen v. Robson, 16 Q. B. 137 (1885).

2. *Subscription to mutual protection fund no partnership.* Society formed, by annual subscription of its members, for protection of their interests in trade, acted through a committee, which it stipulated to indemnify out of the funds raised by subscription, or by an assessment. Committee, upon A's qualifying himself by becoming a member, appointed him printer and stationer for the society. He sued the committee for materials and services. Defence: A their copartner, who gave credit to the fund. A obtained verdict.—Sustained, because no finding that A looked only to fund for payment, and exonerated committee from liability for its acts. Subscribing to the fund didn't make A a partner. Caldicott v. Griffiths, 8 Exch. 898 (1853).

Mutual insurance not partnership. B, a mutual insurance Co., with members in different States, insured A, of Georgia. His widow claimed that the war prevented him from paying the premiums, and asked to have the policy reinstated upon payment of the arrears. Defence: B a partnership, and dissolved by the war.—Not a partnership; but if so, A entitled to a share of the assets at the date of dissolution. Cohen v. N. Y. Mut. Life, 50 N. Y. 611 (1872).

3. *De assecur.* gl. 20, No. 4, cited, Troplong, Sociétés Civiles et Commerciales, vol. 1, p. 21, Paris, 1843.

4. Bravard-Veyrières, Traité des Sociétés Commerciales, pp. 15, 26, Paris, 1862.

5. Vavasseur, s. 23.

6. *Any association for gain, not a corporation, is a partnership. Car-trust a partnership.* Association formed to buy rolling-stock, and to sell and let it to R. R. Co., which agreed to pay in ten annual instalments the price, which should be sufficient to cover principal, interest and expenses. Members furnished money, and received certificates for principal and interest at 6 per cent., but payable only out of net rentals. Trustee held title, issued certificates, and executed leases. Association taxed as partnership.—Liable. Ricker v. Am. Loan and Trust Co., 140 Mass. 346 (1885).

a. "Que doit-on entendre par bénéfice? Faut-il nécessairement qu'il "consiste en une somme d'argent à partager? Evidemment non. "Il suffit que ce soit un avantage commun appréciable à prix d'ar "gent." Rousseau, Sociétés Civiles et Commerciales, s. 64, Paris, 1878.

b. Rousseau, s. 66.

c. De Societate, c. 1, No. 4, cited Troplong, p. 9.

d. "La société est un contrat par lequel deux ou plusieurs personnes "convennent de mettre quelque chose en commun dans la vue de "partager le bénéfice qui pourra en résulter." C. C., s. 1832.

§17.

The commencement of a partnership is fixed by the will of the parties.

When does the partnership begin? If not at once,[1] the date may be fixed at the outset,[2] or left open for subsequent determination by the partners, or by a third person; or it may depend on a contingency.

The commencement of partnership, if made to depend upon a condition, which would prevent the partnership from coming into existence unless the condition had been performed, will not be suspended where the partners proceed to carry on the business, and do not wait for the performance of the condition. They will be deemed to have waived the performance by transacting the business as if there had been no condition.[3]

The unauthorized act, however, of a party does not commit the firm and establish the business.[4]

1. *Partnership dates from agreement, not from beginning business under it, and the purchase by a partner, though for his quota, if made on joint credit, binds all in a name which he adopts.* B agreed to erect a distillery on his land and let it for 15 years from date of the agreement, C & D to fit up the establishment, stock it, and adjust each partner's quota by his contribution. C & D to conduct the business in consultation with B. All to share the cost of distillery, and jointly own stock and establishment. D, on strength of B's credit in N. Y., bought merchandise, for which he gave a note in B, D & Co.'s name. Nothing was done to carry out the agreement, and the business never began. Defence: Purchase by D for his contribution and partnership a project not realized, because the conditions preliminary to its existence were not performed.—Judgment for A. The defendants were jointly interested in the business, and were co-owners of the merchandise, which was to be sold for their mutual benefit. The agreement took effect on its execution, and empowered each to bind the others. C's use of a name implied its adoption by B and D. Aspinwall v. Williams, 1 Ohio 84 (1823).

2. If a father puts his son into business with another, as a clerk, on a salary graduated by the profits, for three years, and at the expiration, as a partner, the son would

not be liable for debts contracted during the three years, because the provisional arrangement lasted until the end of the term.

Ad interim clerk not a partner until the term expires. B, a manufacturer, advertised for a partner, and C's father, in response, arranged for C to become B's partner. The arrangement was subsequently postponed for 3 years, and it was agreed that in the interval C should have a salary, ascertained by the profits, but not so as to be liable as a partner. C acted as a partner, by opening letters and discharging clerks, and stated that he was B's partner. A, who was in the habit of supplying B with goods, sued C for the price of goods sold after the arrangement. A did not know, when he sold the goods, of C's statement, that he was a partner, though B then told him that C was his partner.—Not liable, as B's declaration to A did not affect C, and his admission was not known to A when he gave B credit. Arrangement made C a clerk for 3 years, and not a partner until the term expired. Edmanson v. Thompson, 8 Jurist N. S. 235 (1861).

If a lender took interest and a percentage of the coal mined, and, as security, an assignment of the lease and title to the works, and stipulated for three-fourths of the profits when repaid his loan and expenses, he would not be a partner, because the partnership would not begin until the loan was refunded.

Equitable mortgagee of mines and prospective partner, upon repayment of loan, is not a partner until repaid. By articles, B advanced C £2,000, for working a coal mine, and assumed liability for that amount. B stipulated for 10 per cent. interest and for a commission of 3d. a ton on the coal mined. He took assignment of lease and title to works until he should be reimbursed. After payment of advance, royalties and expenses, he was to have 3-4 the net profits, and C 1-4 and a salary. C worked mines, and became insolvent. B died before his advance was repaid. A sued B's executors for debt incurred in working mines.—A lender, and not a partner until loan repaid and subsequent arrangement took effect. Dean v. Harris; Harris v. Butterfield, 33 L. T. 659 (1876).

3. *Carrying on business waives condition of partnership. Not war, but interdiction of commercial intercourse, dissolves partnership.* Articles of N. O. firm, in which B was a general partner, declared that they should be void unless C became special partner. C refused, but firm continued business, and accepted a draft in A's favor, April 23, 1861. B returned to his home in N. Y., April 27, 1861. A sued B. Defence: War, which began April 13, by attack on Sumpter, dissolved the partnership.—Recovered. Firm waived C's membership by continuing business. Though war begun, partnership not dissolved until commercial intercourse interdicted by President's Proclamation in August, 1861. McStea v. Mathews, 50 N. Y. 166 (1872).

Beginning business makes partnership. By articles, partnership between A & B was to begin when each had contributed his quota. B paid his share in part; A paid in full. They hired and stocked a store, and began business. B never paid up his contribution, and A, being excluded from store, sought to recover, as owner, the possession of stock bought with his money.—Beginning business constituted a partnership, and was a waiver of condition as a preliminary. Stock belonged to firm. B's failure to contribute, or A's exclusion

was a ground of dissolution, and A's remedy was a bill for an account. Azel v. Betz, 2 E. D. Smith 188, N. Y. (1853).

4. *Act of partner in excess of authority does not begin the business.* B contributed patented articles, and sold them. The proceeds were equally divided. C authorized to take notes in payment, and endorse B & C's name. D paid a pauper $2, who made a note to B & C, and C endorsed it, in B & C's name, to D. He endorsed it to A, a *bona fide* purchaser. A sued B & C. B's defence: No partnership and note a forgery.—Judgment for B. C's first act, being in excess of authority, was a forgery, and B not estopped, because no business begun, to create reputation of partnership. Hotchkiss v. English, 4 Hun 369, N. Y. (1875).

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§18.

The postponement of a partnership, which enables an option-holder to experiment with the business, does not affect third persons.

The right to make the partnership hang in suspense until the issue of its success or failure is determined, although absolute for the contracting parties,[1] is none the less subject to the rights of third persons. The parties cannot make the commencement conditional, for the purpose of concealing a partnership which does in fact exist.[2] If they were permitted to speculate at the expense of creditors, a business could be established and controlled by a principal, who might shift its liabilities upon a man of straw, and monopolize its profits himself. The disguise is all the more transparent when the option to become a partner, if exerted, relates back to the beginning of the business, and entitles the holder of the option to share the profits from the start.[3] The *prima facies* is that the option does not relate back, but that the membership dates from the exertion of the right, and that proof must be made to establish a relation back to the inception of

the partnership.[4] During the interval, the character of the option-holder is determined by his acts. If the business was in reality controlled by him, and the right was reserved for the purpose of hiding the fact during the period of experiment, until he could proclaim his position without incurring the risks of the business, the form will not affect the substance of the transaction.

1. *Partnership to begin with the making of profits, does not obtain until profits accrue.* A rented factory, furnished capital, supplied machinery, and bought materials for silk lace manufacture. B was superintendent, and was to receive £2 a week from A until profits should be made, and then 1-2 profits. A sued C, the sheriff, for seizing and selling manufactured goods at instance of B's separate creditor.—Recovered, as B could not be a partner until there were profits to be shared. Burnell v. Hunt, 5 Jur. 650 (1841).

2. *Option to take profits makes a partner. Holding out.* A owned a saw-mill, and B managed it, under the name of B & Co., for a share in the profits or a salary, at his election. In the spring, A contracted to saw D's logs. During the summer, B refused to saw them, and, in the fall, elected to take a salary. A, who subsequently bought out B, sued D. He set up the damage caused by B's refusal. Deduction allowed.—Holding B out as partner made A responsible for his acts. B was a partner until he exercised his option, because of his right to the profits. Chamberlain v. Forbes, 3 S. C. 277, N. Y. (1874).

3. *Option to become a partner makes no partnership, inter se, until exerted.* A & B agreed that B should carry on business as B & Co., which should, from the outset, be for the benefit of himself and of A's nominee, if A should nominate a partner within 8 years. A undertook to make advances, and to go security for B, who, in turn, stipulated to carry on the business with A's nominee for 21 years, and to give notes for amounts advanced by B. B kept A advised of the state of the business, and A had right to inspect the books. Cash and bills receivable were deposited with the cashier, who applied them in payment of firm liabilities. During the first 8 years, the proceeds should be applied to pay B, board for himself and family, and £100 a year, and A his advances, with interest, and then B should take 1-3 and A's nominee 2-3 of the profits and losses. Before 8 years expired, B became bankrupt, and A, who had not elected to nominate himself as a partner, proved for his advances.—Entitled, as he had not exercised his option to become a partner, and as there were no firm creditors with whom he competed. Ex parte Davis, in re Harris, 4 DeG. J. & S. 523 (1863).

4. If a lender took no interest, but stipulated for one-seventh share of a market when erected, and then the loan went on account of payment, he is not a partner with the builder, because the agreement referred to completion.

Burden on plaintiff to show that partnership agreement relates back. B advanced money, with interest, to C, a builder, for the erection of a market, and, on its completion, agreed to take 1-7 interest in it. His advances went on account of payment, and if not equal to valuation, he agreed to pay the balance; if in excess, C agreed to pay interest on surplus as a loan. Profits had accrued before agreement was made, but no account had been taken. A sued B as a partner, for services and materials furnished during construction of building. Verdict for defendant.—Sustained. As a contract *prima facie* speaks from its date, and as B had taken no share in the profits, the jury was entitled to negative a partnership from the beginning of the operation, although B's advances made without interest, resembled a contribution. Howell v. Brodie, 6 Bing. N. C. 44 (1839).

Lender's option does not make him a partner. B, on 1 September, 1867, made advances to C, an oil refiner, and took a mortgage on his works as security. C agreed to repay advances before 1 January, 1870; until then to pay B 30 cents a barrel for oil refined, to keep accounts, and let B inspect books, and to keep works insured and unincumbered. If B elected, before 1 January, 1879, to become a partner, the advances would become his contribution, and he would share profits from commencement of business, returning the 30 cents a barrel received, and paying C an annual salary of $2,000. B did not elect. A sued B & C as partners.—Judgment for defendants. Irwin v. Bidwell, 22 Sm. 244, Pa. (1872).

But where a man's contribution is already in the business, the option to become a partner is practically the right to take the profits, if any accrue, and this is a partnership.

§19.

The contribution is made by a partner to the firm, and is his separate obligation.

There is no partnership in the contributions. Although the partnership may begin before the contributions are made, yet the firm is a subseqnent association, and the contributions are individual obligations antecedent to the partnership. Being the quotas which the partners contribute, they charge the individuals, but not the firm. If a partner contributes his quota of stock to the firm, and it becomes firm property, his co-partners do not become liable for the

price. The buyer alone is liable, and he is the partner.[1] If the purchasers agree to pay according to their quotas for a common stock, they will not become jointly liable.[2] The firm does not assume the debt of the individual partner for his contribution,[3] and his attempt to impose it upon his co-partners is a fraud, which would be sufficient to set aside a judgment for collusion against the creditor who knew the purchase was made for a contribution.[4]

The co-partners become liable when the sale is made directly to the firm,[5] or to a partner, if he buys for the firm, although on his separate credit. The business cannot be severed and turned into single ventures in order to let the partner treat the separate purchases as his contribution.[6] Though if nothing is undertaken but a series of optional ventures, the purchases would stand as contributions.[7]

As it is a preliminary condition, the partners may enforce the contribution by an action. But after going on with the business without the contribution, they could not exclude the partner who failed to pay his contribution. The non-payment would entitle them to dissolve the firm, but not to take the law into their own hands and exclude him.[8]

1. *Merchandise ordered by a partner, as his contribution, a separate debt.* B, owner of ship, and others agreed, jointly, to fit her out for a voyage. Each furnished his portion to the cargo, and shared the profit and loss of the adventure in proportion to his contribution. A proved against B, who became bankrupt, for copper bought as his contribution, and subsequently brought assumpsit against the others, as partners, for the price. The defendants had accepted drafts for the copper.—Though liable on drafts, not in assumpsit, because each paid for his own contribution, which did not become joint stock until the voyage began. Saville v. Robertson, 4 Term. 720 (1792).

2. *A purchase in common not partnership.* B, a merchant at Leeds, who was in the habit of dealing with A, at Hamburgh, ordered a cargo of wheat, on account of himself and C, and directed bills to be drawn upon each for his moiety. The correspondence described the

adventure as joint. The cargo was shipped, and each took his half. B paid for his share, and A sued him for balance of price due from C, who had become bankrupt.—Not C's partner, because no sharing of profit and loss, but a separate purchase by each. Gibson v. Lupton, 9 Bing. 297 (1832).

3. *Partner's deed of land held for firm to repay his contribution, gives no title against firm creditors subsequently obtaining judgment.* B, C & D, partners, bought land, though they took as tenants in common. D sold out to B & C, who agreed to contribute $5,000 each, to carry on the business. B conveyed to A, who endorsed his note for $5,000, and who knew the facts, a moiety of land as security. B & C failed. Subsequent judgment-creditor of firm obtained decree for proceeds. A appealed.—Judgment affirmed. Firm title paramount to A's deed, which was, in effect, a mortgage for B's contribution. Bank v. Sawyer, 38 O. S. 339 (1882).

4. *If partner gives firm note and judgment to lender, for money to buy his contribution, firm creditors may attack judgment collaterally for collusion between partner and lender to defraud them.* B agreed to furnish capital for firm of B & C. They bought out D, whom B paid $780, but raised the purchase-money by giving a firm note for $1200, which A discounted for B. B gave a judgment note of the firm and of himself to A, who entered up judgment and took firm property in execution. C asked to open judgment. Refused. He then confessed several judgments to D et al., firm creditors, one of whom sold the firm property on execution, for $916. A claimed priority. Auditor awarded fund to D et al., and excluded A as B's individual creditor.—Affirmed. Judgment collusive, and creditor could attack it before auditor. McNaughton's Appeal, 5 Out. 550, Pa. (1882).

5. *Direct purchase for the concern, and not for a contribution to it, charges the partners.* B & C agreed to repay D his advances in a previous adventure out of the returns from a new venture, and to go halves with him in the surplus of profit or loss. The goods were to be bought and paid for by B & C, and shipped on a certain vessel. D also consigned goods to the supercargo, for sale on joint account with B. A sued D for the price of goods bought by B & C for the shipment.—Liable as a partner, because the goods immediately upon the purchase became stock of the concern, without any intermediate ownership in B & C. Gouthwaite v. Duckworth, 12 East. 421 (1810).

6. *Purchase on separate credit for joint account charges firm.* B, C & D manufactured leather in partnership, A buying as an individual, on his separate credit, one-half the hides, B and C the other half, and dividing the manufactured leather for sale as separate individuals. A sold B hides and sued the firm.—Recovered. The purchases and sales were made for the firm. Everitt v. Chapman, 6 Conn. 247 (1827).

7. *Partner's purchases contributions for optional undertakings.* B, C & D agreed for shipment and sale of cattle on joint account. Each might buy and present cattle for shipment. If accepted by the others, they became firm stock. A, who knew nothing of joint arrangement, sold B cattle. C rejected, but D accepted, them, and they were sold for joint account of B and D.—A's judgment against firm reversed. No partnership until contribution accepted. Valentine v. Hickle, 39 Ohio St. 19 (1883).

8. *Failure by partner to pay contribution in full don't entitle the copartner to exclude him without a dissolution.* A, B & C formed partnership to erect buildings and carry on business. Each to con-

tribute $10,000. A owned land, valued at $6,000, which he put in as part of his contribution. After business had begun, B & C excluded A, because he had not paid up in full. A brought bill for dissolution and account.—Decree. B & C might have brought suit for balance, or for dissolution, but could not exclude A without a dissolution. Hartman v. Woehr, 3 C. E. Gr. 383 (1867).

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§20.

If taken into a firm already formed, a partner cannot be held for a contribution, unless he agreed to make one.[1]

A partner not being liable for the contribution of his co-partner, is not charged for the contribution made before he became a member of the firm. He is not charged as a partner before he becomes a partner, nor after he joins the firm are his liabilities carried back, and made by relation to precede his membership. If admitted to share in a shipment after the merchandise was bought, he does not become liable for the price.[2] The buyers alone are liable, because the merchandise alone was contributed by them. In the absence of a stipulation that he should reimburse them a part of the outlay, in proportion to his share of the profits, the law will not imply such an obligation. Unless they stipulate for a contribution by him, the capital borrowed by the firm for its business cannot be charged as a joint expense, and a portion corresponding to his share of the profits be deducted from his account.[3] The law does not make a partner contribute. The contribution is the result of his agreement. An existing partnership is presumably equipped with its capital stock, furnished before the firm began business.

1. Gow attributes this to the partnership contract: "A subsequently "acquired joint interest has not the effect and operation of altering "and varying the nature of the original contract. . . If such an *ex* "*post facto* operation were ascribable to an after-acquired right, the "law would in fact create a supposed contract, when the real con-"tract was consummated before the joint interest and consequent "joint risk was in existence. No subsequent act or acknowledge-"ment therefore will create in a party the character of, or render him "liable as a partner upon a contract, if it clearly appears that a part-"nership did not exist at the time the contract was made." Gow on Partnership, 31. London, 1823.

2. *Admitting party after purchase of goods to share in adventure does not commit him for price.* B bought goods of A for shipment to the Baltic, and let C take 1-5 part in the adventure upon delivery of the goods on board. A sued C for the price.—Not liable, because the goods remained B's property until contributed to the joint enterprise, by giving C an interest in them. Young v. Hunter, 4 Taunt. 582 (1812).

3. *Unless a partner is liable to contribute capital, his co-partners can not charge him interest on money borrowed as working capital for the firm.* B & C owed A $1,126.36 for arrears of salary, when they took him into the firm, and gave him 1-5 of the net profits for 5 years, and 1-4 for 2 years. A, in account, claimed that the net profits were $35,776.38, but B & C estimated them at $31,121.69. The difference was the interest on money borrowed by B & C, as capital for the business.—Decree for A. The inference to be drawn from the articles and conduct of the partners was that B & C should furnish the capital. If they borrow it, they should pay interest for the loan, and not A, who made no agreement to contribute any capital. Topping v. Paddock, 92 Ill. 92 (1879).

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§21.

The Court determines the legal effect of the contract, but its terms, if oral, are found by a jury.

Who ascertains whether a partnership exists or not depends upon the nature of the contract. If it is in writing, the court interprets the meaning of the parties and determines the legal effect of the articles. If the contract is not in writing, the jury finds what the contract was,[1] and the court decides the legal effect of it.[2]

1. *What the contract between the parties is, must be found by a jury.* A, a retail dealer, had an arrangement with B, the brewers, to supply him with beer. A's version was that B should have 17sh. a barrel out of the profits in consideration of his paying 1-2 A's rent, and A should

have the rest of the profits. B's version was, that he should pay 1-2 A's rent, and repay himself by adding 17sh. a barrel to market price of beer which he supplied to A. The question, upon petition of A's assignees in bankruptcy, was whether this agreement constituted a partnership.—Which version was true, was an issue of fact for trial by a jury. If B shared the profits, he was a partner; if he charged his half of the rent in the price of the beer, he was not. Ex parte Langdale, 18 Vesey, Jr., 300 (1811).

2. *Upon undisputed facts, question of partnership a conclusion of law.* B & C agreed to contribute capital to buy live-stock, and to share the profit and loss of their dealings. B, who did not complete his contribution, gave a bill of sale for stock to his separate creditor, A, who brought trover. B & C insolvent. C's defence: Question, whether B partner only in profits or also in stock, for jury.—Judgment for defendant. Court decides upon undisputed facts. Firm title not devested by B's sale. Kingsbury v. Tharp, 28 N. W. R. 74, Mich. (1886).

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§22.

Unless the terms of the contract have been definitely settled, the contract is not concluded.

As the partnership results from a contract, the terms must be finally settled by the parties, or there will be no contract which can be enforced. The business, if undertaken, would not operate as a substitute for the contract, if the parties meant to agree upon the terms but failed to complete the bargain.[1]

1. *Specific performance of partnership contract not enforced until terms definitely settled and plaintiff able to fulfil his obligations.* A, B & C were engaged in organizing a sewage company. B was to furnish capital which was to be repaid out of profits, and was to receive a commission on the transactions. C divulged his process for making yeast, and they agreed to be partners for its manufacture. B was to supply the money, and A and C do the work. They started three different places of business under various names, though B took leases and kept bank account of each in his own name. They had articles drawn up, but did not sign them, and then quarrelled and put A out. He brought a bill to enforce the contract.—Specific performance refused, because he had neglected to secure execution of the contract and was never in a position to bear the losses imposed by its terms. Ellis v. Ward, 21 W. R. 100 (1872).

§23.

The intention to be partners is not equivalent to a contract of partnership.

The intention may be reconsidered, and until embodied in a contract it does not charge the parties who entertain the project as partners by anticipation.[1] The failure of a projected company to come into existence after the applicant has qualified himself as a member, would save him from liability as a partner. He would have made an offer to become a partner, but there would be no company in existence to accept it.[2] A would-be-member is not liable for the acts of the projectors, except so far as they were his agents.[3] On the other hand, if an applicant takes part in organizing a company, but does not comply with the requisites of admission, he does not become a member in due legal form.[4] He is not a partner, and cannot be charged as a member of the company. He may even have the right to demand the privileges of membership, and yet not be a partner; he may hold scrip which entitles him to demand certificates of stock, but he is not a partner until he exerts his right and becomes a member of the company.[5]

1. *Intention not equivalent to contract of partnership.* B, and 4 others, bought cotton, with intent, but without contract, to sell on joint account. B held the cotton. He consigned it to A for an advance, pretending that he had authority. A lost on consignment, and sued the others for the loss.—No partnership until intention to sell passed into a contract. Baldwin v. Burrows, 47 N. Y. 199 (1872).

2. *Taking stock in projected Co. no partnership until Co. established.* Prospectus issued for projected Co., to be organized by a deed, and all who did not execute it within 30 days were to forfeit their interest. B applied for shares, which were allotted to him, and he paid the first deposit, but took no part in the concern, though his name was inserted, by Secretary, in the list of subscribers on the Co.'s books. A sued B, as a partner, for services and materials furnished the Co.

—Not liable, because he had only offered to become a partner in the Co., which never came into existence, and had not constituted the projectors his agents. Fox v. Clifton, 6 Bing. 776 (1830).

3. *Promoters not liable beyond subscriptions.* A, B et al., subscribed and paid for stock of projected corporation for a college. A advanced money in erecting buildings, and sued B et al. for contribution.—Not liable. Subscription limit of defendant's undertaking. Shibley v. Angle, 37 N. Y. 626 (1868).

Intermediate partnership until incorporation. A held notes of B & C, partners, in Connecticut, 24 January, 1877, when D, of Boston, and E, of Providence, advanced $2,000 for a quarter interest in the business and a quarter of the capital stock of a corporation to be organized to carry on the business. A, upon hearing of agreement, did not press for payment, but took renewal notes after 24 January, 1877. A also discounted note, 22 June, 1877, for $300. Neither D nor E took part in business, or knew of contract being divulged to A. —A obtained judgment for $300. D and E partners from 24 January, 1877. Connecticut law governs question of partnership. Citizen's Bank v. Hine, 49 Conn. 236 (1881).

A partner's status in a firm may be assumed without liability as a qualification for incorporation. A, B & C, partners, contemplating incorporation, agreed with D to take him into their business upon his paying $5,000 in cash and giving his note for $5,000, and to divide the shares in the projected corporation in proportion to the contributions in the business. D was to share the profits from the date of his payment. The firm was insured, and a clause avoided the policy for any change in the title or possession of the property, or if the interest of the assured was anything but the entire unconditional and sole ownership of the policy. Defence: Change by D's becoming a partner.—D not a partner. Prospective stockholder and intermediate lender. London Assurance Co. v. Drennen, 113 U. S. 51 (1885); 116 U. S. 461 (1886).

4. *Scripholder, though intending to become a partner, is not such in fact.* B applied for 30 shares of a projected Co. 10 were allotted to him. He paid, on account, £15 a share, signed 'some' deed at Co.'s counting-house, received scrip, and attended a shareholders' meeting. A sued him, as a partner, on an acceptance of the Co.—Evidence insufficient to charge B as a partner in fact, or by holding out. Dickinson v. Valpy, 10 B. & C. 128 (1829).

Signing prospectus, and aiding organization of a company, is not joining it. B signed prospectus, which announced the project of a company and the terms of subscription. He attended a subscribers' meeting, and solicited others to take shares, but never paid his subscription. A supplied goods to company, and sued B as a partner.—Not liable, because a declaration of intention to be a partner is not sufficient to make out an actual partnership. Bourne v. Freeth, 9 B. & C. 632 (1829).

5. *Holding certificate and paying deposit do not make a stockholder.* B paid deposit on a share in Co., and received a certificate, which described her as the holder of share No. 133 of Co.'s stock. She had never signed any deed, though she had spoken and written of herself as a shareholder. A, who knew nothing of her holding herself out when he made the sale, sued her for price of merchandise sold and delivered to Co.—Not a member, although she thought she was, as the certificate conveyed no interest in the stock. Vice v. Anson, 7 B. & C. 409 (1827).

§24.

Trading in corporate form without a franchise, is a partnership.

Persons acting in corporate form without a franchise are partners, and are liable for the acts of the administration which they have organized to carry on the business.[1] Even in the case of a valid incorporation the stockholders theoretically direct and control the management of the corporation, and, as the ultimate repositaries of the corporate power, they authorize and sanction its exercise. This theory would charge all the corporators as partners, were it not for the exemption secured by the franchise.[2] The immunity from liability for joint transactions can be obtained only by a grant from the State. It is the charter which secures the exemption. Nevertheless, trading as a coporation has been held not to charge the stockholders as partners where they, or the parties who dealt with them, transacted business in the belief that they had a charter. The corporate existence in law was justified by faith. But they were none the less doing acts which constitute partnership, and they are charged as partners by law, which they are bound to know. It is no answer to say that they should not be made partners by operation of law, unless the law renounces its prerogative, and refuses to pronounce the legal effect of the transaction. The reason for the decision is simply the hardship of the common law, which charges every proprietor of the stock with unlimited liability as a partner, although he took no part in the management of the business (§3). Doing business in corporate form without a charter presents an extreme application of the dogma. Where there is a corporate

franchise, the stockholders are not, practically, principals in the business, for they possess but a shadow of power in the management of the corporation. This is the justification for the exemption which the sovereign grants by the charter. The member of an unincorporated association is as remote from the management and control of the organization as the corporator in a chartered company. This brings out the hardship of the member's position in being charged with unlimited liability, but there is for him no relief consistent with the structure of the Common law, except a grant of immunity from the Sovereign power.

A *de facto* is an illegal corporation, because the incorporation was not effected according to law. The color of authority for the existence of such a corporation is derived from tradition. When the franchise was a direct grant made by the Executive or Legislative department, the charter was deemed the act of a co-ordinate branch of the Government, and, in deference to the Political Power, was treated as a judgment which could not be impeached collaterally. The prohibition by Constitution of special grants, and the statutory regulation of incorporation has made it subject to judicial cognizance, and has changed the character of incorporation from a Public to a private transaction. The incorporation has become, and is now, the act of the incorporators In cases of incorporation under general statutes, the Executive department of the Government is powerless to prevent the incorporation. Its action is purely ministerial.

Since provision has been made for incorporation by general statutes, and compliance with the statutory requirements is the only condition of the franchise, a

corporation has the status of a special partnership. The corporator, like the special partner, claims exemption from the full measure of the liability which, by the Common law, attaches to his acts. The special partner, however, furnishes co-partners who are liable to the full extent for the joint acts, whereas all the corporators claim the benefit of a limited liability. In a choice between a corporation and a special partnership, the law, which exacts the security of individual responsibility, must prefer the special partnership, which involves a narrower exemption. But neither is privileged in the first instance. In each case immunity must be proved, for it is a universal principle that he who claims a special privilege must make out the exception upon which he relies. The burden of proof rests upon him, and is the condition of his right. If the law has prescribed the requisites, nothing short of compliance with the requisitions of the law will be sufficient to establish the exceptional privilege.

The question arose under general mining laws, and the change in the character of incorporation, from a Public to a private act, was recognized by the Supreme Court of Pennsylvania.[4] The position was subsequently reconsidered, and the decision declared not to be law.[5] The change of the process was admitted, but the effect of the change was denied. Upon what basis of reasoning does the denial rest? The staple of the argument is the miserable plight of the stockholders, who are charged as partners. But hardship proves too much. If unlimited liability for joint acts is unjust, the Common law exaction should be restricted, and a limited liability allowed where the corporator, or part-

ner, takes no part in the business. So long as the principle stands as a part of the law, and is admitted by the court, the hardship does not furnish a legal reason for rejecting the law. This is self-evident, and the hardship of the case must not be permitted to mask the real position. The *ratio decidendi* was that self-incorporation under statutes is, by tradition, the grant of a charter by the State. The corporators are protected by the reminiscence of the deference shown to acts of Government in the days when the franchise was received by direct grant from Parliament or the Crown.

A point is made by MORAWETZ, to uphold his argument, that a *de facto* corporation protects its members from liability as partners. It is this: If the corporators are charged as partners in a *de facto* corporation, the members of a *de jure* corporation must also be charged upon the same principle for its *ultra vires* acts.[6] The answer to his position divides itself into two parts. *First*, As to *ultra vires* contracts. There are none. A contract made by the agent of a corporation in excess of its authority delegated to him is not the contract of the corporation, and does not create a corporate obligation.[7] In order to charge the corporators as partners upon an *ultra vires* contract, they must all unite, and authorize it to be made; otherwise only the persons who do or authorize the act are liable.[8] *Second*, As to torts. Between the tort-feasor and his innocent associates, they are always *ultra vires*. The partner, or corporator, who commits a tort is liable individually, like any other tort-feasor, for his act, although when he is acting in the course of the joint business, his tort charges the firm, or corporation.

Nevertheless, the ultimate liability is that of the wrong-doer, who must reimburse his co-partners, or the corporation. Of course it was never intended by the charter to authorize the corporation to commit such torts, but in charging the company the liability cannot be said to be incurred in excess of the franchise. In fact, the endeavor to trace the liability of a corporation to an authority from the State to perform the acts by which the liability is entailed is misleading. The real purpose of a charter is not to grant powers, but to secure exemption. The so-called powers in the charter are nothing but a description of the scope of the business for which the members have obtained the exemption. They are liable as a corporation for every act done in the course of that business, not because they are authorized by the State to do the act, but because the act is an incident of the business which they themselves undertake. When the tort is not incident to the business defined by the charter, it stands upon the same footing as an *ultra vires* contract. No one is liable but the tort-feasor and his accomplices, and they are charged to the full extent of their individual capacity. No foundation, it thus appears, exists in law, which is the embodiment of principle, for the analogy instituted between a *de facto* corporation, which charges the members, because they have no right to transact business, except as partners, and a *de jure* corporation, which has the right to transact business, and is liable for the tort of a member, because it is committed in the course of the corporate business. The abuse by the agent of his authority charges the principal, because the authority exists.

The act of a person who has no authority charges him, because he is a principal.[9]

The effect upon a charter granted by the State of Pennsylvania prior to the present Constitution, of an acceptance by the corporation of subsequent legislation in its favor, might be to reduce it to the status of corporations formed under the general statutes, which regulate self-incorporation. This would do away with the Dartmouth College case in Pennsylvania, and bring corporations, like other persons, under the sovereign control of the Commonwealth.[10]

1. *Unincorporated society a partnership.* Joint stock company appointed trustees, who, in exercise of their discretion, purchased a printing press.—All members liable for price, as partners. Wells v. Gates, 18 Barb., N. Y., 554 (1854).

   Managers of unincorporated society appropriated property of the body to their own use. Some members sued for conversion. Defence: Non-joinder of the others.—Suit maintainable by some partners on behalf of all, under Code. Dennis v. Kennedy, 19 Barb., N. Y., 517 (1854).

   Contract for salary with alleged corporation don't bind a subsequent president and stockholder as partner. A was employed, as superintendent, by B, president of an alleged corporation. Afterwards, C subscribed to stock, and was elected president. A reported to him, and drew upon him for salary and expenses of business. Until it failed, C supposed the company had a charter. A sued C for salary. —Judgment for C. A's contract with B. C not bound by a contract made before he became a partner. Fuller v. Rowe, 57 N. Y. 23 (1874).

   Contract severable, according to services rendered?

2. *If partners transact business in corporation form, they are bound by act of directors within scope of business, although irregularly executed, unless objected to at the time.* A stage line was organized to go from Cincinnati to Sandusky, and stock issued to subscribers, who held part until it could be placed. They elected directors, who bought and consolidated with a line from Cincinnati to Columbus, abandoning the northern half of the route. This was done at an irregular meeting, but with the knowledge of the stockholders, and without any protest by them. The company became embarrassed. Creditors' bill for account and contribution.—Decree. Stockholders partners, and liable for contribution. Purchase of mail route, and consolidation with it, within scope of business, and irregular transfer waived by stockholders' acquiesence. Holder of stock charged as if *bona fide* subscriber. Rianhard v. Hovey, 13 Ohio 300 (1844).

3. *Continuing to act as a corporation after the charter has expired, does not charge the stockholders as partners.* Neither B and C, stockholders, nor any one connected with the corporation, knew that the charter had expired. A dividend was declared subsequently, and received by B and C. D, the secretary, gave a corporation note, after

the expiration, to A, who sued B and C as partners.—Not liable. Joint owners are not partners. B and C not even joint owners, but *cestuy que trust*, entitled only to share in surplus after corporation debts are paid. Partnership arises from intention, or holding out, but not 'by operation of law.' Dividend was not received as the profits of a partnership, but of a corporation. Central City Savings Bank v. Walker, 66 N. Y. 425 (1877).

Assuming a franchise creates a de facto corporation, which exists until decree of ouster. In 1874, city, B, sold lots to C, taking his mortgage for unpaid purchase-money. C conveyed to association A, which, acting as a corporation, though illegally organized under General Statutes, divided lot, and sold parcels to co-defendants. B, in 1879, recorded mortgage. In 1880, Attorney General obtained decree that A never had any corporate existence. B brought suit on his mortgage and vendor's lien, and, relying on *quo warranto*, obtained judgment, A's evidence of attempted incorporation being excluded. A appealed.—Judgment reversed. Title and conveyances of *de facto* corporation valid until decree of ouster made. Not a question of estoppel, but of public policy. Society Perun v. Cleveland, 43 O. St. 481 (1885).

4. *Self-incorporation under general statutes valid only if statutory requisitions are fulfilled.* B et al., partners, who had erected mills and carried on manufacturing business, organized under the general mining law, and five of them certified that they had each subscribed 2000 shares of $50 each, for the capital of $500,000, and that $351,525 had been actually paid in. In fact, the only capital was the firm stock, and the actual payment was the money previously expended during the partnership. Shares of stock were issued to the partners in the original firm, who then transacted business as a corporation. 495 shares of the $500,000 were never issued or paid for. A sold B et al. cotton, and sued them as partners.—Recovered. Incorporation unlawfully effected, no protection against creditors. Paterson v. Arnold, 9 Wright 410, Pa. (1863).

5. Cochran v. Arnold, 8 Smith 399, Pa. (1868).

6. Private Corporations, by VICTOR MORAWETZ, 2d ed., 1886, s. 748, *ad finem.*

7. *Ultra vires contract not binding.* Railroad A, without authority by its charter, leased railroad B for 99 years, and operated the road. A et al., who guaranteed performance of the terms, brought bill to enforce contract.—Dismissed. *Ultra vires.* Pa. R. R. v. St. Louis, Alton & Terre-Haute R. R., 118 U. S. 290 (1886).

Torts of municipal officers charge city which they represent. Municipal corporation A sued to recover $12,000 exacted by B, internal revenue collector, as special taxes on spirits distilled by A, but not deposited in U. S. bonded warehouse, as required by law, and paid under protest. A demurred to plaint, because the distilling was done by officers who exceeded their authority.—Judgment for B. Corporation liable for torts of officers competent to exert its powers. Salt Lake City v. Hollister, 118 U. S. 256 (1886).

8. *Ratification by a partner of acts beyond the scope of the partnership not binding, unless all the partners ratify them.* B and 22 others organized company C, which was not incorporated, to construct, equip and operate a railway in connection with through line, D. The trustees of C bought of A all the stock of a line running parallel with D for a short distance, making D the principal debtor, and the mem-

bers of C sureties for the price. B, in his letter of approval, stated that "the purchase was to be paid for by the duly authorized notes of C." Thirteen out of 23 members of C ratified the purchase. A claimed payment out of B's estate.—Disallowed. The purchase was *ultra vires*, and did not bind the members of C, unless they adopted it. B's approval was qualified, and not binding without a ratification of all the members. Roberts' Appeal. 11 Norris 407, Pa. (1880).

9. MORAWETZ, §748 and §699, who has collected a mass of cases, discusses the contrariety of opinion which prevails upon the subject, in consequence of the neglect to revert for the solution of the problem to the first principles of the Common law.

10. *A corporation's acceptance of legislation may be made a condition for its renunciation of chartered privileges.* A, under Act 16 May, 1857, extended its track, and thereby subjected itself to Act 3 May, 1855. A also accepted Act 15 April, 1868, and subjected itself to Constitutional Amendment of 1857, Art. I, s. 26, P. L. 811. These provisions made the renunciation by a corporation of its exemption from State control the condition of its acceptance of subsequent legislation in its favor. B, under Art. XVI, s. 8, in Constitution of 1874, recovered damages for property not taken by A, but injured by the construction of its elevated track. A appealed.—Judgment affirmed. A surrendered its corporate exemption, and legislature resumed its discretion to impose additional liability. Pa. R. R. v. Duncan, 1 Am. 352, Pa. (1886).

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§25.

A contribution gives the property to the business for the duration of the partnership, in other words, gives the use of property; but trade, which is buying and selling, deals with the ownership, and, necessarily, vests the title in the firm.

What is meant by the contribution of a partner to the stock of a firm? Does the partner contribute the use and enjoyment of a fund, or of merchandise, for the duration of the partnership, and retain the ownership of the stock contributed by him, or does he convey to the firm the ownership of the property?

The title would, unless some reason existed for shifting it, remain vested in the partner, and nothing but the use of the property would be contributed to

the firm. The use is sufficient to answer the purposes of the business. This is apparent in real estate, which is not an article of trade. If a partner owns the building occupied by a firm, and used as the stand for transacting its business, he would contribute the use and occupation to the joint stock, but he would retain the title as his separate estate. The firm could neither sell nor encumber the premises. The title could be aliened or charged only by the contributing partner, as he remains the owner.[1] But merchandise is the staple of trade, and is governed by its laws. Third persons may object to a partner's retaining the title to property contributed by him. The firm must act as owner, and will be held as owner during the partnership.

The answer to the question, it thus appears, depends upon the nature and effect of trade. If it did not affect the character of property, did not make it fungible or consume it in the use, there would be no necessity for the partner's transfer of his title to the firm. If the real estate is a mere incident, not the substance of its transactions, the use is sufficient to enable the firm to transact its business, and persons dealing with the firm could not be misled by the acts of the firm, which does not assume to own the property, but merely to possess it. But partnership is for trade, and the stock is bought and sold by the firm. The joinder in trade is to buy and sell. The business requires that the firm should have the ownership of its stock. The use and enjoyment would be of no service, because the property is not for use, but for sale. The title, therefore, must be vested in the firm, in order to enable it to transact its business.[2] Each partner may exert the powers of

the firm, and he has the right to sell, not only his own contribution, but also the contribution of his co-partner. This is a right inherent in a partner, and if it is taken away from him he is reduced from the rank of a co-principal in the business to the position of an agent.

It was held at one period in Pennsylvania that the capital stock might remain the property of the contributing partner, and that a levy upon it by his separate creditor would take precedence of an execution issued by a firm creditor. But the decision was made upon the theory of working out a firm creditor's right through the equity of the partner, and not upon a consideration of the necessity which exists that a commercial firm must have the title to its stock.[3] The facts of the case did not call for a decision in this aspect, and the precedent may be explained by referring it to the class of non-commercial partnerships. The business undertaken was a livery-stable. The lease and fixtures, as well as the equipment of horses and vehicles, might be owned by the partner who contributed the means to procure them. The co-partner would have no joint ownership of the property, because there was no necessity in the business for him to deal with the title. He could fulfil the purposes of the partnership by managing the business, which did not involve a sale of the property, but merely its use. The case, under any circumstances, could not stand as a precedent for commercial partnerships. The contribution of a partner remains his separate property at the farthest only until it is converted by a sale. The sale is a joint act, and the proceeds belong to the firm. The purchase of goods to replace the mer-

chandise sold is made upon the joint credit of the partners, and the title vests in them. The vendor of the original stock, bought by a partner for his contribution, has no lien upon it in the hands of the firm.[4] He cannot claim the proceeds of a sale or follow the stock into a different corpus. The partner who contributes property, for which he has not yet paid, to the stock of a firm, does not commit a breach of trust, but performs a legitimate operation of business. The vendor has no standing as a *cestuy que trust*, to treat him as a delinquent trustee. On the contrary, they stand as buyer and seller at arms length. The sale and re-purchase of stock are the very elements of trade, and must be assumed as a fact in the business, if not proved. The stock, therefore, will, in the absence of evidence to the contrary, be presumed to belong to the firm.[5] As a conversion of the stock is the purpose of a commercial partnership, the law, when it requires a contribution, vests the title in the firm, and excludes a separate execution.

If the title is in dispute only between the partners, and the controversy does not affect strangers, the articles may make the contribution separate property. A partner may stipulate to retain title. He does not then contribute the property to the firm, but keeps both the title and possession himself.[6]

1. *Partner's contribution of building, a usufruct during the partnership.* B & C, partners in publishing establishment. B owned the building, and firm used it, without lease, for its business. A issued execution against firm. Pending final process, B sold his interest to D, who joined C in a new firm, which assumed the debts of old firm, but before sheriff's sale C & D assigned all firm assets to A, who brought bill against B for use of building.—Dismissed. Usufruct of building contributed only for duration of partnership, and ceased upon its termination by B's retirement. Rapier v. Gulf City Paper Co., 64 Ala. 330 (1877).

2. *Title to contribution passes to firm.* A insured his stock in company B. Policy avoided if A's interest in the property was any other than the entire unconditional and sole ownership, or if any transfer or change was made of his title or possession. A took C, his clerk, into partnership, giving him a share of the profits, and against his capital stock of $157,000 stipulated that C should contribute $10,000 the first year, and let 1-3 of his salary remain until $10,000 more accumulated. C prohibited from using commercial paper, or drawing checks, and funds deposited in A's name. The stock was destroyed by fire before C had contributed anything. A sued B for insurance. The nature of the contribution, as a temporary disposition over the fund during the limited period of a partnership, was relied on to disprove a transfer of property by the owner to the firm, which he formed with his clerk.—Judgment for B. In form, and in external fact, the title did pass, said the Court, even if only for the occasion, and subject to reverting upon a dissolution: In substance between the parties, said the dissenting Judge, without reference to outsiders, the title did not pass. Mallery v. Atlantic & Marine Ins. Co., 51 Conn. 222 (1883).

3. *Title to firm stock retained by contributing partner.* B & C, partners in keeping a livery stable. B furnished capital, and retained exclusive title to the stock until C should pay a contribution, which he never paid. A issued separate execution against B, and, subsequently, D a joint execution against both.—A entitled to proceeds of sale. York Co. Bank's Appeal, 8 Casey 446, Pa. (1859).

4. *Partners make contribution of one, firm stock by contracts of sale and re-purchase. Seizure on separate execution enures to firm executions.* B bought goods of A on credit, and contributed them to firm. C contributed labor; profit and loss were equally divided. In course of business, the stock was sold out and replaced. A sued B for price, and levied on the stock. Firm creditors issued executions, but sheriff made no second levy. He sold the goods, and paid proceeds to firm creditors. A sued sheriff and firm creditors for proceeds.—A had no vendor's lien. B & C could not deny firm title, because they made the contracts of sale and re-purchase. Sheriff's seizing stock on separate execution enured to firm executions. Ryder v. Gilbert, 16 Hun 163, N. Y. (1878).

5. *Stock, though contributed wholly by a partner, through the co-partner's default in paying his quota of the price, if replaced by joint purchases, becomes firm property, and a joint execution takes it away from a prior separate execution.* B & C, holding themselves out as partners, bought and sold stock on firm account. C failed to contribute any capital, and received, as his interest, a commission on sales. A issued execution against B, and firm creditors followed with joint executions.—In default of evidence that any of the original stock remained, which was B's property, as C failed to pay his half, the current stock was presumed to belong to the firm, and to have been bought on the credit of B & C. A's separate execution was accordingly postponed to the joint executions, which took the proceeds. Walter's Appeal, 1 Chester Co. Reps. 278, Pa. (1881).

6. *Partnership inter se without joint stock. Advance, with guaranty of profits, not a loan, but a partnership.* By agreement, A 'advanced money to B,' for purchase of cattle, which A was to *own* till sale. B did the work. Profits divided equally, and B guaranteed A profits equal to 20 per cent. on his advance. B attempted to hold the cattle, claiming that the transaction was a cover for a usurious loan. A brought account, averring a partnership, and claiming the whole

property.—Partnership without any joint stock. A entitled to 1-2 profits on sales, and to all the property on hand. Robins v. Laswell, 27 Ill. 365 (1862).

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§26.

Special partnership is not an exception, but is the normal type of the relation.

The type of partnership at the Civil law made the co-operation of a proprietor in the management of the business the test of his unlimited liability as a partner. The special partnership embodied this principle. The introduction of this kind of partnership into the Common law ran counter to the instincts of the Common lawyers, who made the property element, or the interest of a proprietor, the sole test of partnership. A dormant partner, the commercial type of the undisclosed principal, represented the Common law partner, pure and simple. Special partnership impeached the general principle of the Common law, and released the special partner from the unlimited liability which the Common law imposes upon every proprietor. The doctrine of the undisclosed principle was felt to be the obstacle in the way of any limitation of liability at the Common law, and the attack was directed against that principle.[1] But the doctrine was found to be too firmly imbedded in the law to be uprooted. Upon the failure of the assault, limited liability was introduced by legislation.[2] The alteration introduced by statute was not revolutionary, but left the principle of unlimited liability in force, except where a full disclosure of the limitation of liability was announced by the record, and brought home to the customers.[3]

The expediency of giving a trader the faculty to limit his liability under the precaution of notice brought home to his customers, was obvious. The limitation of liability was proclaimed as the new gospel of trade.[4] The persecution of the special partner by the courts, in spite of this prevailing tendency to introduce a limitation of liability, can only be explained by the professional belief that the recognition of a special partner would abrogate the Common law principle of unlimited liability. The statute, however, did establish a special partnership, and that was the end of it.[5]

The refusal to recognize this variety of partnership, except under restrictions, which render its existence almost impossible, has led to the wholesale abrogation of the Common law principle of unlimited liability. As usual, the last state is worse than the first.

1. *Undisclosed principal liable on agent's contract.* B did business as C's agent, but in his own name. B accepted bill in A's favor, contrary to C's commands. A sued C. Defence: C unknown to A at time of acceptance.—Judgment for A. Bill given in course of business bound C as undisclosed principal. Edmunds v. Bushell, L. R. 1 Q. B. 96 (1865).

2. Act March 21, 1836, P. L. 243, Pa., and Supplements.

3. An anonymous writer in the American Law Review, takes the ground that notice to creditors relieved a participant in the profits, who had stipulated against liability, and that this principle would relieve a known special partner who had not complied with the statutory requirements. Article on Liability as a Partner, 2 Am. L. Rev. 7, 8 and 202: 1877.

4. Lord BRAMWELL has recently recounted the history, but his address is reported only in the daily press.

5. The language of SMITH, J., Eastman v. Clark, *infra* § 44, n. 1, gives the true rationale of special partnerships:

"If it be argued that it is against the policy of the law to allow a "man a chance to share in the receipts of a business without also "sharing all its liabilities, the answer is that the law permits such "agreements as the present to have full force and effect, when the "stipulations are known to those dealing with the parties. * * * *

"The intrinsic justice of this legal principle seems to be recognized "by the legislative enactments relating to limited partnerships "'which provide for the public record of the partnership limitations "as a method of making them known to third persons.'"

§27.

A partnership in the profits without a proprietorship of the stock is a misnomer in a commercial partnership.

The sale by agents, or brokers, who receive a share of the profits, would not deserve mention were they not said to be partners in the profits, but not in the stock of a firm. They are, in fact, nothing but agents, and the designation of partners is stripped of all meaning by limiting the partnership to the profits, which are only the result of a business. It is the sharing made by proprietors which indicates that they are the principals, or partners, in the business.[1] For this reason a partner in the profits for soliciting orders could not bind the partners who owned the stock by the release of a firm debtor, who paid him.[2] As he was but an agent, selling was the limit of his power, and receiving payment exceeded his capacity. Nor could a partner in the profits, who bought for the partners, draw upon their bank deposit.[3] He was only a broker, who had no title to the goods bought, nor to the proceeds, but merely to the profits. A partner in the profits abroad disposed of a cargo which had been pledged, but replaced it by merchandise which he bought, and remitted the bill of lading, which the partner, in England, handed over for the substituted cargo to the creditor. But the debtor who failed between the sale and re-purchase, could not pass the title, as it went, upon his bankruptcy, to the assignee for creditors.[4] Had the foreign agent been a partner, his bona fide disposition would have been a valid transfer of the title.[5]

1. *Individuals said to be partners in the profits, though not in the stock.* A pastured bullocks on C's land, and agreed to share the price which they brought, above £20. with C, for fattening them. A sued B for price, and he pleaded non-joinder of C.—Overruled. C not a partner in the bullocks, though he was in the profits. Wish v. Small, 1 Camp. 329 (1808).

'*Partner in the profits' not a partner, because not a co-owner of the stock.* A, by agreement in 1873, contributed the capital and owned all the stock, and B his labor and experience, to carry on the business as A & Co. B did not bear any loss, and his working interest was 1-3 the net profits, increased in 1877 to 1-2. C recovered judgment against A, and put execution in hands of sheriff, D, who levied on part of firm stock, which A replevied.—Judgment for D. Property retained by A, as B was not a partner. *Query:* Would B's liability as a partner justify holding assets for firm creditors? Stumph v. Bauer, 76 Ind. 157 (1881).

2. *Sharing profits of sale gives no title, or power over stock.* A & B, clothiers, and also jobbers, employed C, as traveling salesman, to solicit, by sample, orders for piece goods. He received a compensation equal to 1-2 profits. A & B sued D for price of goods. Defence: Release by C.—Recovery. C a clerk. No inference admitted from extent of his agency of power to release. Though a partner in the profits, not a co-owner of stock with A & B, who alone were liable for its price. Smith v. Percy, 5 Dutch. 74, N.J. (1860).

3. *Share in profits gives sharer no title to proceeds of goods.* By prior agreements, B, a broker, who bought for A, took 1-4 profits and 1-8 losses of adventures, in lieu of his commission. A continued to employ B as agent, but, by a new agreement, gave him 1-3 profits and made no provision for losses. B drew, as a partner, upon the proceeds deposited by A with C, his bankers. A became bankrupt, and his assignees sued C for amount of A's deposit.—Recovered, as B had no title to the goods, or to the proceeds which represented them, but was merely entitled to a share of the profits. Smith v. Watson, 2 B. & C. 401 (1824).

NOTE.—C would be a third person, and entitled to deal with B as a partner. This would be a defence, if B had not indemnified C, and made the controversy *inter se.*

4. *A share in profits and losses of adventure gives share-taker no title to stock.* A pledged bills of lading to B for a cargo bought for him by C, his foreign agent, who shared 1-2 the profits and losses of the adventure. C sold part of the cargo abroad, without A or B's knowledge. A became bankrupt. Then C replaced the goods sold by others, and sent a bill of lading to A, which he gave to B. A's assignees in bankruptcy brought trover for the substituted goods.—Recovered, because B could get no title to the goods from C. He was not a partner as to the stock, which belonged to A, but only in the adventure. Meyer v. Sharpe, 5 Taunt. 74 (1813).

5. *Partner can pledge firm stock after co-partner's bankruptcy, if ignorant of the act.* B, in England, and C, in Maryland, partners. D had advanced money on acceptances of B, who secretly left England and exchanged residences with C. B secured D by consignments of tobacco. Subsequently C committed an act of bankruptcy in England, and failed. A joint commission issued against both, on account of B's leaving England. Assignee brought trover against D.—Judgment for D, because a *bona fide* purchaser from B. Creditors had waived B's absconding as act of bankruptcy. Fox v. Hanbury, Cowp. 445 (1776).

§28.

The enhancement in value of a contribution during the partnership enures to the firm, which is also chargeable with any depreciation.

The accessory follows the principal. The contributing partner who desires to withdraw the property contributed by him is entitled to what he put into the firm, but not to any increment added to the contribution during the partnership.[1] The accretions are attributed to the firm, as owners.[2]

Where the partner retains title and contributes only the use of his property, the value of the increase will be estimated and credited to the firm if the property cannot be severed from the original contribution.[3] The arrangement of the partners for a withdrawal of the contributed stock at its original valuation, is equivalent to a retention of title by the contributing partner, and if it afterwards becomes inequitable, the courts will not give it effect, but will revert to the normal method of adjustment.[4]

1. The language of the German and of the Austrian Code is identical: „S. 143. Wenn ein Gesellschafter Sachen in die Gesellschaft eingebracht „hat, welche Eigenthum derselben geworden sind, so fallen dieselben bei der „Auseinandersetzung nicht an ihn zurück, sondern er erhält den Werth aus „dem Gesellschatfsvermögen erstattet, für welchen sie gemäss Uebereinkunst „ubernommen wurden. Fehlt es an dieser Werthbestimmung, so geschiet „die Erstattung nach dem Werthe, welchen die Sachen zur Zeit der Einbring „ung hatten." Die Geltenden Handelsgesetze des Erdballs, von Dr. Oscar Borchardt, *sub vocibus*, Berlin, 1886.

2. *The increase in value of contribution belongs to firm.* A contributed, in 1861, mill and machinery, at £24,000; B, £2,500 cash; C nothing. At first, A took 1-2 and B and C each 1-4, but afterwards each took 1-3 until C's death, when A succeeded to his share. At the end of that year A and B each took 1-2. Capital and accumulated profits carried interest. The mill was enlarged, lands bought, and other buildings erected during partnership, with firm funds. The entries put mill and plant at original price, showing increase by improve-

ments and repairs, and decrease by annual depreciation. No revaluation during partnership. A & B sold out, in 1872, receiving £57,052 for mill and fixed plant, and £48,744 12s for movable plant and good will. A claimed £57,052 as his capital.—Allowed only his original price. Like the contribution, its enhancement in value belonged to the firm, which neither rented the mill and plant from A, nor repaired them for him. Robinson v. Ashton, 20 Eq. 25 (1873).

3. *Improvements on partner's land, made with firm funds, belong to firm.* A & Co. built part of its brewery establishment upon A's land. A's executors brought bill against surviving partners.—Firm charged with original value of land appropriated, but credited with enhanced value, which is divisible as profits. Frelinghuysen v. Ballantine, 38 N. J. Eq. 266 (1864).

A & B were carpenters in partnership. B built a house, with firm assets, on his own lot. Firm dissolved. B sold the house and lot to C, and left the jurisdiction. A paid firm debts beyond his quota, and claimed title to lot against C, who still owed $1000 on account of the purchase-money. C is a bona fide purchaser for value, without notice of the firm's claim to improvements upon it, except to the $1000 purchase-money still due. Devoney v. Mahoney, 8 C. E. Gr. 247, N. J. (1872).

4. *Option to withdraw foundry superceded by rebuilding with contributing partner's co-operation.* By articles, A contributed a foundry at appraisement, reserving option to withdraw it on dissolution at appraised value. The foundry was burnt down during the partnership, and was rebuilt with firm funds, A co-operating. In the settlement, he insisted upon a return of the land, and at its original valuation; in order to gain the rise in value.—Court refused him the land, and gave it to the firm at the original valuation. Clark's Appeal, 22 Sm. 142, Pa. (1872).

§29.

If the question of title to the contribution arises between the partners, and without reference to third persons, the distinction between a commercial business and other kinds of business, is simply a matter of form.

Fungible goods become the property of a firm, in spite of the partners' intention, on account of the nature and effect of trade. The use which is made of the thing carries with it the ownership.[1] The identical thing cannot be restored, because it is lost by transacting the business. A different thing, although

the same in kind, must be returned in its place. But apart from the holding out involved in the firm's dealing with the title as its own, the distinction between fungible and non-fungible property does not affect the partners. If they intend to contribute nothing but the use to the firm, that is all the firm will get. The transfer of title will be merely an incident of the business; it will not control the partners in dealing with each other, or override their intention. The partners may shuffle the title as they please.

1. The German and Austrian Codes agree in making contributions firm property:
„S. 91. Wenn Geld oder andere verbrauchbare oder vertretbare Sachen, „oder wenn unverbrauchbare oder unvertretbare Sachen nach einer Schätzung, die nicht blos zum Zweck der Gewinnvertheilung geschiet, in die „Gesellschaft eingebracht werden, so werden diese Gegenstände Eigenthum „der Gesellschaft." And the Austrian Code adds: „Im Zweifel wird „angenommen, daſs die in das Inventar der Gesellschaft mit der Unter„schrift sämmtlicher Gesellschafter eingetragenen bis dahin einem Gesell„schafter gehörigen, beweglichen orber unbeweglichen Sachen Eigenthum der „Gesellschaft geworden sind." Borchardt, *sub vocibus*.

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§30.

Merchandise being the subject-matter of trade, partnership, as an organ of trade, converts everything in which the firm deals into merchandise.

When the title to property contributed by a partner is not required by the firm for the transaction of its business, the use of the property constitutes the contribution, and the title remains in the contributing partner (§25).

But the fact that the firm has the use, indicates that the property is connected with the business, and a

slight indication of intention is sufficient to transfer the property to the firm. Thus an agent was sent to Cuba to work mines, and if he effected a sale he was given half the price. He undertook to work the mines and share the profits with the principal according to their contributions. He made no property contribution, unless the agreement for a sale was looked upon as vesting title to the mines in the firm. He would, in this aspect, contribute one-half the capital stock, as he would get half the price of the mines if they were sold. This was the interpretation put upon the contract.[1]

1. *Contract for 1-2 the price of mines not enforced if parties subsequently became partners in working them, and shared profits according to contributions, the right to 1-2 the price being the plaintiff's only contribution; but remedy, account.* A was employed by B to go to Cuba, look after B's mines, and ship the asphaltum. B furnished the money, and agreed to give A 1-2 the profits on a sale of the mines, products and patents. They shared the profits of working the mines, as partners, in proportion to their contributions. The business did not succeed, and B sold the mines. A sued him for half the price. Defence: A's remedy, account.—Judgment for B. By making his share in the partnership depend upon his contribution, A must have put into the firm the moiety which he owned in the mines by virtue of his right to half the price of them on a sale, and could not afterwards sue B on the contract. Seelye v. Taylor, 32 La. An. 1115 (1880).

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§31.

Conflicting theories prevail of the contribution, and unsettle the property rights of the partners where they have not fixed its character by an express provision.

In the first place, the contribution may become the property of the firm out and out, so that upon a dissolution the contribution will be divided, like other assets, in proportion to the shares of the respective

partners. This is the English theory, but the courts have discovered no mode of working it out to a logical conclusion.

In a partnership at will, if one partner contributes $10,000, and the other his services, and they share the profits and losses equally, the partner who made the contribution might die the next day, and the survivor might legally appropriate $5,000 of the capital stock, although the whole amount, $10,000, was contributed by the deceased partner. Thus, one partner contributed a music-hall and tavern, the other contributed no property, but he was entitled to 1-8 of the profits. Upon a dissolution 1-8 of the music-hall and tavern belonged to him.[1]

If this theory be true, and the $10,000 in the case put were lost in the business, the non-contributing partner, who has lost nothing but the expectation of profit, could not be held to make up the loss to the partner contributing the capital. *Res perit domino.*

But the law of England, on the contrary, makes the non-contributing partner share the loss of his copartner, a result consistent only with the theory which makes a partner creditor of the firm for his contribution.

The recent English decisions indicate a disposition to abandon the view that the title to the contribution is vested in the firm, and to take up with the theory that a contribution is an advance.[2]

1. *28 and 29 Vict. c. 86 does not create a limited partnership.* B, for £250 paid him by A, undertook to convey him in partnership 1-8 profits of a music hall and tavern, under 28 and 29 Vict. c. 86, which B called the Limited Partnership Act. No duration fixed for loan or partnership.—Partnership at will, and defendant's denial in his answer terminated relation.—A entitled to 1-8 profits during continuance, and to 1-8 of hall and tavern on sale. He intended to be a

partner, with liability limited to his loan. Syers v. Syers, 1 App. Cas. 174 (1876).

2. *After contributions re-imbursed, assets shared as profits.* A & B, who had been partners, with shares in proportion of 3-1, took in C, and re-adjusted the interests thus: A 40 per cent., B 35, and C 25. B contributed most of the capital, C a little, and B less. The credit balances at expiration of partnership were: A $214,815, B $58,422, and C $60,762, which were made up by crediting the estimated profits each year and adding interest, with an allowance to A of $2,500 a year for rent. A asked for a division of assets according to the contributions. B and C according to capitals of partners at dissolution.—Contributions reimbursed with interest, and surplus divided according to shares of the profits. Binney v. Mutrie, 12 App. Cas. 186 (1886).

The second theory which has obtained currency is that the contribution is a loan by the partner to his firm, in other words, to himself and co-partners, and is charged as a debt, to be repaid before any division of firm assets can be made. This theory obtains in Massachusetts.

It is the Civil law *mutuum* revived. The contribution is merchandise, which is fungible, and can not be returned in specie. This is the distinctive characteristic of the *mutuum*. The partner's loss of title to his contribution, which is merged in the firm stock, although for temporary purposes, and his inability to recover it in specie, led to confounding his position with that of a lender. The idea of a contribution is lost in that of an advance.[3]

Two partners contributed the capital, and two their services, each receiving 1-4 the profits. Upon a dissolution the firm owed to each contributing partner the amount he had contributed.[4] The firm debt was, say $100,000. Each partner was liable for one-fourth, or $25,000. Each contributing partner, after deducting $25,000 to pay his quota of the loss, is still entitled to recover $25,000, and each non-contributing partner must pay that sum to equalize the loss. If a partner is insolvent, the loss is distributed, as a debt,

among the solvent partners. The quota of each partner would be $33, 333·33⅓, and the non-contributing partner would be liable to pay that amount for the indemnity of his co-partners. A partner who is out of the jurisdiction is treated as if insolvent, because the process of the courts cannot reach him, and his quota of the loss must be divided among the partners amenable to judicial process.[5] The theory of debt would make the contribution carry interest, but the Massachusetts courts do not allow interest upon the contribution without a stipulation to that effect.[6] The theory of debt halts again where they decide that upon dissolution a partner's title to his contribution revests in him.[7] He has the right to seize the assets which remain in the firm, for his contribution, without first devesting the joint title by judicial proceedings. This is the prerogative of an owner, for no lender can touch the property of his debtor without judgment and execution.

3. This is the French law:

"Si les choses dont la jouissance seulement a été mise dans la "société sont des corps certains et determinés, qui ne se consomment "pas par l'usage, elles sont aux risques de l'associé propriétaire. Si "les choses se consomment, si elles se détériorent en les gardent, "si elles sont destinées à être vendues, ou si elles ont été mises dans "la société sur une estimation portée par un inventaire, elles sont "aux risques de la société. Si la chose a été estimée, l'associé ne "peut répéter que le mantant de leur estimation." C. C., 1851.

"Si ce sont des choses qui se consomment par l'usage même qui en "est fait, comme le vin, l'huile, l'argent monnayé etc; car il est de "règle que la simple tradition des choses fongibles en transmet la "propriété même; en pareil cas la société en devient propriétaire et "par suite elle est débitrice envers l'associé qui a fait l'apport de "choses de même nature et qualité, ou de leur valeur." Vav. s. 92.

4. *Contribution a firm debt, and each partner liable for its repayment.* A and B contributed the capital, C and D their services, to the firm. Each partner to receive 1-4 the net profits, after deducting interest on the contributions. The firm dissolved, and A wound up the business, which resulted in a loss. D was insolvent. A demanded repayment of his capital, as a partnership debt. D's defence: His labor became capital; but no intention to insure either contribution.—Recovered. Each solvent partner must contribute equally to repay the capital. Whitcomb v. Converse, 119 Mass. 38 (1875).

5. *Loss apportioned according to interests of partners within jurisdiction.* A, and others, some in Massachusetts, and some who afterwards removed from the State, formed a ferry company, as a partnership. The proceeds, less expenses, went to the subscribers *pro rata.* A paid money for the firm, and sued the members in Massachusetts for contribution.—Recovered. Loss apportioned in proportion to interests, and members out of jurisdiction disregarded, like insolvents. Whitman v. Porter, 107 Mass. 522 (1871).

6. *Assets go on account of, and in proportion to, the contributions, and each partner must make up the deficit in proportion to his share of the profits.* A, B & C, an infant, who agreed to share profits equally, dissolved, and made B liquidating partner. He might retain, out of the assets, his contribution, $4,874, without interest, and after paying the debts, repay A's contribution, $1,800, without interest, and apply the balance to C's contribution, $882. The assets were not sufficient to repay the contributions. A and B claimed that the contributions should be repaid with interest, that the assets should be shared in proportion to the contributions, and that each partner should make up one-third of the deficiency. C's defence: Infancy. That each partner should have 1-3 of the assets, and make up the deficit in proportion to his contribution.—Assets divided in proportion to contributions, but no interest allowed on them. Each partner liable for 1-3 of deficiency. Moley v. Brine, 120 Mass. 324 (1876).

7. *Partner entitled to repayment for his contribution before profits are computed.* A agreed to furnish all the capital, and B his services, in carrying on a drug store, and divide the profits equally after deducting interest and expenses, including a salary to B. A contributed $3,300. The firm dissolved, and A's executrix claimed to deduct $3,300 capital, and then take half the residue as profits.—Recovered, less 1-2 the loss, i. e., depreciation in value of the fixtures. The contribution becomes firm property, but reverts to the contributing partner upon dissolution. Livingston v. Blanchard, 130 Mass. 341 (1881).

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§32.

The theory that the contribution is a debt has been adopted in several States, besides Massachusetts.

It is recognized in Georgia. The contributing partner, upon a dissolution, agreed to pay all the debts of the firm. His contribution was construed to be a debt, and, as such, was embraced in his agreement.[1]

In Indiana. A partner, who furnished the capital to erect buildings and provide the machinery for manu-

facturing in partnership, was entitled to collect from his co-partner a portion of the loss caused by fire, corresponding to his share of the profits.[2]

In Illinois. The destruction of buildings and machinery was a loss apportioned equally among the partners, because they shared the profits on an equal footing.[3]

1. *Partner's agreement, upon dissolution, to pay firm debts includes what the firm owes him for his contribution.* A contributed skill and labor, and B contributed property, which would belong to the firm when paid for out of the net proceeds of the business. Upon dissolution, B agreed to pay the firm debts, and A made over his interest in certain assets, including B's contribution. Some proceeds were left undivided, and B held them as his own. A brought bill for his share of them. Bill dismissed at the hearing, because it contained no averment that the proceeds in question exceeded the net proceeds which were to be applied in payment for B's contribution.—Reversed. Dismissal admits facts set forth in the bill: That the individual assets belonged to the partners in equal proportions: That B agreed to pay all debts. This included the firm debt to B for his contribution. Tellyett v. Markham, 57 Geo. 11 (1876).

2. *Share in profit and loss measures the distribution of the loss of capital.* A and B furnished the capital and C did the work. A received 10 per cent. on his capital, and B and C salaries. Then profit and loss divided equally. A partial loss of capital.—In account, C must bear 1-3 of the loss. Carlisle v. Fenbrook, 57 Ind. 529 (1877).

3. *Agreement to divide losses includes partial loss of capital.* A contributed building and machinery, at $9,600, and B and C, together, $2,500. Profit and loss divided equally during partnership. Buildings destroyed by fire. A charged B and C, each, with a third of the loss of capital. Defence: Only a loss in excess of capital to be equally divided.—Loss of capital divided equally. Taft v. Schwamb, 80 Ill. 289 (1875).

In New York the theory has been fully discussed, and perhaps settled. A partner contributed $2,000 for 3-4 of the profits. The co-partner contributed $2,000 for 1-4 of the profits. The court accounted for the excess of profits as a compensation to the partner for his services. The conjecture was but a shrewd guess, while sharing the losses in proportion to the contributions would effect the same result upon principle.[1] In another case, also decided by a lower court, the losses were distributed, in spite of Judge HOFF-

MAN'S reasoning in his dissent from the decision in Hasbrouck v. Childs, not in proportion to the contributions, but in proportion to the profits.[2] The Court of Appeals has recognized the debt theory without discussion.[3]

1. MAJORITY: *Profits will be apportioned as a return upon contribution, and as a compensation for services.* MINORITY: *Losses of capital are borne in proportion to contributions without reference to shares in the profits.* A contributed $2,000, and did all the work; B contributed $2,000, and did no work. A took 3-4 and B 1-4 the profits. No mention of loss. Partial loss of capital. A claimed half the residue. B's defence: A should bear 3-4 the loss.—Recovered. *Majority:* 1-2 profits went to A, as compensation for services, the other 1-2 was divided between them as partners. *Minority:* A not a clerk; he received extra profits as a partner. Equality a presumption of fact. In the absence of agreement, profit and loss divided according to contribution. In such case, if one contributes labor and the other capital, the jury alone can decide the value of the labor contribution. If money is contributed against labor, the two form a joint fund, and the loss of capital is counterbalanced by a proportionate loss of labor; if only the use of money is contributed, *res perit domino.* The contributions and the shares of profit and loss may be in different proportions. Then, as profits are not divided until capital is deducted, so losses are not apportioned in the ratio of profits, except for a deficiency beyond capital; otherwise the partner having the larger share of profits would guarantee his co-partner's capital *pro tanto.* Hasbrouck v. Childs, 3 Bosw. 105, N. Y. (1858).

2. *Losses shared like profits in absence of agreement.* A, B & C manufactured tubs. A and B furnished factory, stock and funds, and C carried on the business. Card contained the names of all three. The profits were shared equally. Loss of nearly all the stock. A and B brought account against C.—Decree. Presumption that losses shared like profits, unless rebutted. Munro v. Whitman, 8 Hun 553, N. Y. (1876).

3. *Agreement must be clear to rebut the inference of debt.* A contributed merchandise, estimated at $15,000; B merchandise at $3,000. Profits and losses, including depreciation of stock and expenses, were shared equally. A charged B one-half of his capital lost in excess of B's capital.—Recovered. The clause did not distinctly provide for a division of the assets in proportion to the contributions and relegate the division of loss to the excess after the contributions were restored, Jones v. Butler, 87 N. Y. 613 (1882).

The German law pushes the debt theory to its logical conclusion, and makes the contributions carry interest. The increment goes to swell the profits of the contributing, and the losses of the non-contributing, partner.

RENAUD gives the following illustrations: First, of profits, when both partners contribute. A contributes \$1,000, B \$9,000. At end of the year there is a profit of \$2,000. A takes \$40 interest on his contribution, at 4 per cent, B \$360 on his; in all, \$400 deducted before the net profits of \$1,600 is divided between them, giving A \$1,840, and B \$10,160. Second, of losses. The end of the year shows a loss of \$2,000. As \$40 is due A, and \$360 B, for interest, the aggregate, \$400, is added to \$2,000, and A stands half the loss, or \$1,200, which takes all his capital, and after deducting his interest, \$40, pays half B's interest, or \$860, to him. Third, of profits, when one partner contributes property and the other does not. A contributes no property, B \$10,000. At the end of the year there is a profit of \$2,000. B takes \$400 interest and half the balance of \$1,600. He receives his capital, \$10,000, interest, \$400, and profits, \$800, in all, \$11,200. A receives \$800. Fourth. A loss of \$2,000 at the end of the year. Each makes up half the loss of principal and interest. A pays \$200 on interest, and \$1,000 on principal, account to B, who also loses \$1,200. Commanditgesellschaften, §33, pp. 233-4.

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§33.

The only theory consistent with partnership is that the firm acquires the title to the partners' contributions by reason of the business in which the firm is engaged, and for its purposes alone. Trade involves the title as an incident of its function. The owners are not presumed to part with the title, except for the purpose of the joint business. The moment the object of the joinder is accomplished, the title reverts to the original proprietor. The use carries the title by trade necessity, but the co-partner can not retain it after the trade purpose is satisfied. Upon this theory the partners share the capital stock according to their contributions, and share the deficit beyond the contributions as they share the profits.

The title to the contribution, though involved in its use by the firm, is between the partners separate estate.

Who has the title to a partner's contribution? provoked a controversy; which began in the middle ages,

and still continues at the present day. The arguments urged by the disputants made the answer turn upon the point whether the partner contributed the property itself, that is, the full ownership of it, to the firm, or only the use and enjoyment of the property, while he retained the title in himself. The result of the discussion was a general consensus of authors. They united in thinking that the partner contributed only the use. He retained the title himself.[1] The position established by medieval authority is no less sound to-day than it was when first taken. The ancient authority has, in recent times, been called in question, but the reason for doubting the soundness of judgment displayed by the sages of law in settling the controversy are not tenable. The modern obscurity arises from confounding the substance of the transaction with its form. The title, when required by the business, must be vested in the firm, in order to enable it to deal with or dispose of the property for the purposes of the business. For this reason the partner makes a transfer of his title to the firm. The effect of changing the title, upon creditors who deal with the firm, has been stated (§25). They acquire rights by reason of the firm's dealing with the title. They rely upon the title which the firm holds out to them as its own. This is an incident of commercial business, which involves buying and selling property, or exerting the powers of proprietorship. But the partners do not possess the stranger's right to insist that the title shall belong to the firm. They know the actual title, and do not infer a title from the indicia of ownership. Nor is their position changed by dealing with the firm as owners of the property. The

partnership is not in fee or for life. The transfer of property is restricted, like the partnership, to a given period, or is at will. They know that the title remains in the contributing partner, subject only to the firm's right to control the title during the partnership. This is equivalent to the firm's use of the property which remains in the contributing partner, and at his risk, though temporarily subject to the enjoyment of the firm.

1. It is sufficient to refer to the authors who give a summary of the literature upon this point: 15 Glück's Erläuterung der Pandecten, p. 394 *et seq.* §965; TROPLONG, p. 61 *et seq.*, §587; Judge HOFFMAN, in Hasbrouck v. Childs, 3 Bosw. 112 *et seq.* The exceptional provision of the French Code, *supra*, §31, n. 3, which makes the contributions firm property, is ascribed to POTHIER, who followed ARÉTIN against the array of great Civilians. TROPLONG, *supra;* VAV., §85–94. The German and Austrian codes have followed the French, *supra*, §29, n. 1.

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§34.

In Pennsylvania the losses of capital are shared in proportion to the contributions.

A partner contributed $10,000, the co-partner his services, and they shared the profits equally. The capital was lost, and the contributing partner sued his co-partner for half the loss, $5,000. The court refused to shift the loss, or any part of it, upon the defendant.[1] The contribution is the property of the partner. When the title passes to the firm, either on account of the nature of the property or the convenience of the business, the transfer is made only for the occasion, that is for the partnership. Apart from the business, the property belongs to the contributor. He does not

give his property away after the partnership is ended. The contribution is limited to the duration of the partnership. When the partnership is dissolved the title reverts to the original owner. The purpose for which the title was transferred has been served, and the provisional title of the firm is exhausted.

1. Everly v. Durborrow, 8 Phil'a R. 93 (1871).

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§35.

A partial loss of capital must be distributed according to the theory of the contribution which prevails.

The question presents itself frequently where there has been a partial loss of the firm capital. The loss must be distributed either according to the theory of a debt, or of separate titles in the partners. By the debt theory as the excess of capital contributed by any partner in the case of a total loss must be made up by the co-partners, so must any partial loss of capital be made up by the partner who contributes less than his co-partner in the ratio in which he shares the profits. The effect of the plan is to make the partner who contributes no capital to the firm stock insure the capital of his co-partner in the same proportion as he shares the profits.

A contributes $100,000, B his services, and they share the profits in equal parts. A loss occurs of $50,000. B owes A $25,000. That is, by the debt theory, the firm owes A $100,000, but A, as a partner, owes himself $50,000, and the loss is divided between them, $25,000 each.

The English theory vests the title to the contributions in the partners in the proportion in which they share the profits, but this theory discloses no reason to charge the non-contributing partner with half his co-partner's loss of capital. Each partner would lose his half of the joint property, and that would be the end of it. In the case put, each partner owns $50,000 of the capital, and after sharing the loss according to his ownership, has $25,000 left. It is inconsistent to make the partner's ownership in his co-partner's contribution a premium paid for the insurance of the contribution to a corresponding amount. This would make the contribution a debt which the partner owed, not a title which he owned. The theory has no foundation in reason, nor is it maintained with the steadness which indicates a belief in its soundness. A slight suggestion of a different intention by the partners is sufficient to supercede the theory and re-establish a distribution of loss according to the contributions.[1] In fact, the readiness to revert to the separate titles of the partners, in order to measure a loss of the contributions among them, is proof of a legal instinct, if not of a conscious apprehension of the theory which is consistent with partnership.[2] The theory does not prevent the partners from dividing the assets in a proportion different from the ratio of contributions, if they see fit to make such a contract. The theories which have been acted on are inferences drawn by different judges from the conception entertained by them of the partnership relation, and are superceded by any agreement made by the partners.[3] The inference is made only in the absence of an agreement by the partners upon the point.

The question does not affect third persons, and is not affected by their right to make the contribution firm property for themselves. The question relates to a domestic arrangement between the partners, and is limited to their rights. The adjustment is made subject to the claims of third persons, and embodies the ultimate settlement between the partners after all claims against the firm have been disposed of. The intention of the partners regulates the matter; which is confined to themselves, and controls the construction of the courts.

If the contribution belongs to the partner making it, the title will measure the loss. He takes the risk of his property, which he staked in the business. As each contributing partner does the same, a partial loss of capital is divided between partners in proportion to the amount contributed by them.

The contributions of two partners were as three to one, A $9,000, B $3,000, but the profits were divided equally. The partial loss, $3,000, was divided between them in the ratio of 3 to 1. $2,250 by A, $750 by B, the assets left being the property of each partner in the proportion in which he contributed them, A $6,750, B $2,250.[1]

1. In England, the partners agreed to divide the assets according to their interests in them. The English construction makes the interest of a partner in the capital stock correspond with his share of the profits, but the agreement indicated, it was thought, an intention to divide the assets according to the contributions made by the partners, and superceded the construction of law.
Partners' agreement to divide surplus assets according to interests in them overrides legal construction of provision to share profit and loss equally, and divide assets according to contributions. A & B, partners, agreed to share profits and losses equally, and, upon dissolution, to divide the surplus assets according to their interests in them. The contributions by A & B were as 1 to 2, and carried interest. Either partner, who might let his profits accumulate, would be paid interest on the additional capital. B made advances, apart from his contribu-

tion and accumulated interest. On settlement, the assets amounted to £3,000; A's capital to £830, and B's to £4,000. B, who wound up the business, took the assets for his excess of capital. A sued for a share of the assets proportioned to his capital.—Recovered. The assets are the capital, and distribution according to interests in them is according to contributions, and excludes equal liability for them as debts; which must be paid before equal distribution of profit and loss could be made. The advances, independent of contribution, charge both partners equally, as a debt. Wood v. Scoles, L. R., 1 Ch. 369 (1866).

2. A partner, contributing $75,000, guaranteed his co-partner, contributing $10,000, profits to the extent of $10,000 the first year. The year showed a loss of $10,000. The guaranty reversed the Massachusetts construction of law, and made the guarantor pay his co-partner $10,000, instead of collect $5,000 from him.

Guaranty of profits consistent with partnership. A contributed $75,000, and B $10,000. Profit and loss to be divided equally during continuance of firm. For first year A guaranteed B that his profits should not be less than $10,000; notwithstanding losses to any extent. Dissolution at end of first year, and loss of about $10,000.—B took $10,000, and remainder divided between them, "according to their respective proportions." Grant v. Bryant, 101 Mass. 567 (1869).

3. A supercargo, paying $1,000, stipulated for a salary and a fifth interest in the ship and cargo, which cost between $15,000 and $18,000. The agreement was sufficient in Massachusetts, where a non-contributing partner has no title to firm stock, to give him title to 1-5 of the assets.

Agreement will regulate a partner's share in the firm property, independent of the amount of his contribution. By the articles, B furnished a vessel and cargo, at a cost of from $15,000 to $18,000, and A was supercargo, at $50 a month and 1-5 interest in vessel and cargo, for which he paid $1,000. On dissolution, A claimed 1-5 interest in the property.—Recovered. Partnership, with 1-5 interest to A, notwithstanding salary and the disproportion of his cash contribution. Julio v. Ingalls, 1 Allen 41 (1861).

4. Christman v. Baurichter, 10 Phil'a R. 115 (1874).

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§36.

The ratio of profits, if not fixed by agreement,[1] will be ascertained by the jury, in order to be available as a standard for distributing the loss of capital among the partners.

No ratio may have been agreed upon for sharing the profits. In this event the Code Napoleon enacts: "That when the contract of partnership does not de-"termine the share of each partner in the profits or "losses, his share is in proportion to his contribu-"tion."[2] This provision embodies the general view of Civilians in reference to a partnership for gain.[3] But the German Empire, as well as the Austrian, has adopted, in the absence of a different agreement, the rule of equality for sharing the profits of a business partnership. The Commercial Code says: "Profit or "loss, in default of any other arrangement, is divided "among the partners by heads."[4] The English plan refers the ascertainment of the parts to the jury. That means a reference to the men engaged in such a business, who are alone competent as experts to testify what elements enter into a determination of the question.[5] But sharing the profit and loss does not mean sharing the contributions. They are between the partners separate estate, and the firm looks for its profits to the surplus which is left after the partners have re-taken their contributions, and makes up the deficit which remains after the contributions have been lost. It is only when the amounts contributed by each partner are not known, and can not be ascertained, that the ratio of profit and loss measures the interest of the partners in the assets which belong to the firm, because they cannot be identified by the partners. There is no presumption of law, and the presumption of fact arises only on default of any clue to the intention.[6]

1. *Profits shared according to contributions by contract.* C, in expectation of a Government contract, agreed with A & B to furnish half the capital, and they one-fourth each, in order to carry it out, and to share the profits and losses according to the contributions. C furnished no capital. A & B, who supplied the capital and did the work, claimed

the sum which C recovered from the Government.—Judgment for A & B. Hobbs v. McLean, 117 U. S. 567 (1886).

2. "Lorsque l'acte de société ne détermine point la part de chaque "associé dans les bénéfices ou pertes, la part de chacun est en pro-"portion de sa mise dans le fonds de la société. A l'égard de celui "qui n'a apporté que son industrie, sa part dans les bénéfices ou dans "les pertes est réglée comme si sa mise eut été égale à celle de l'as-"socié qui a le moins apporté." C. C. 1853.

3. 17 Duranton, Cours de Droit Français, 438.

4. Der Gewinn oder Verlust wird, in Ermangelung einer anderen Vereinbarung, unter die Gesellschafter nach Köpfen vertheilt. Com. Code, §109.

5. *In default of agreement, jury settles division of profits and presumes equality, unless inconsistent circumstances appear.* Court below referred to jury the fact of partnership, and, in default of agreement, the proper division of profits.—Submission sustained. In the absence of agreement, the jury, or the judge sitting as a jury, must find the probable intention. Equality a presumption of fact, which becomes controlling in default of all guiding circumstances. Tomson v. Campbell, 5 Wilson & Shaw 16. s. c., Thomson v. Williamson, 7 Bligh 432 (1831).

6. *Contributions and shares in profits presumed to be equal.* A, B & C, partners by oral agreement, each contributing personal and real estate: A and B 350 acres each, and C 640. With the proceeds of the real estate they purchased a ferry franchise and property, which, on dissolution, formed the chief asset. The evidence indicated that D was also a partner. There was no agreement for a division of the profits, and the amounts which each contributed were apparently not proved. A and B, in account, claimed against C a 2-3 interest in the assets.—Each received a 1-4, because, in the absence of proof, the shares were presumed to be equal. Knott v. Knott, 6 Oregon 142 (1876).

Partners share stock and profits equally. A & B, partners. B died, and A was his adminstrator. No agreement fixing share of stock or profits.—Equal shares. In absence of agreement, shares presumed equal. Unruh's Estate, 13 Phila. 337 (1880).

Presumption of equality in capital and profits. A & B, partners, submitted to arbitration. By the award, uncollected assets were divided equally. A had a claim against the firm.—B owed 1-2 the debt. There being no evidence of the partners' interests in profits or capital, their shares were presumed to be equal. Farr v. Johnson, 25 Ill. 522 (1861).

Partners' interests presumed equal. A, B & C owned a farm in common, and managed it in partnership. A lent money to the firm. His executor brought account against B & C. A entitled to credit for his loan. There being no evidence, the interests presumed to be equal. Roach v. Perry, 16 Ill. 37 (1854).

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§37.

The only peculiarity of a special partner's contribution is the statutory requirement, that it must be made to the firm.

The construction put upon the statutory mandate, enacted to enforce the special partner's contribution, is a marvel of hermeneutics. The courts do not recall the historical fact that the partner who does not join in the management of the business, but makes a special contribution, has never been charged with unlimited liability by the Law Merchant, which England adopted. Having lost sight of his original status, they regard him as an exceptional freak of legislation, and proceed to put him outside the pale of judicial reasoning. Whenever a special partner's rights are at stake, trifles become the staple of argument, and captiousness the ruling spirit. The finical objections constantly taken, in order to charge the special partner with unlimited liability, are incomprehensible, especially in contrast to the encouragement given to *de facto* corporations (§24), which are advocated when they are admitted to be usurpations.[1] The reason alleged for extirpating a special partnership applies, with the added force of numbers, to *de facto* corporations, and adds a new gloss to the biblical aphorism, "strain at a gnat and swallow a camel," and exemplifies in law, the domestic economy, which "holds in at the spigot and lets out at the bung." Even the member of a legal corporation, who claims exemption from any liability beyond his contribution, can make out his immunity only through the pedigree of the special partner.

In an admirable summary of the authorities, BATES has stated how, though that was not his purpose, the statutes enacted in the different States, to re-establish the special partnership, which the courts originally excluded, have been used by them to frustrate the

intention of the parties to this commercial contract.[2] Out of the letters of the Statute, as SWIFT did out of the letters of the paternal will,[3] they made for a commercial enactment an artificial construction, which ignored its *raison d'être*.

Special partnership embodies a principle necessary for the developement of modern law. It is a general principle of the commercial law of Europe, and of America.[a] The courts of England, however, excluded special partnership, although they professed to adopt the Law Merchant. The legislature intervened, to correct the blunder and to re-establish a limited liability in commercial enterprises.[b] But a statutory is not equal to a judicial developement, and no discrimination was made between the joint stock companies which could be organized under general statutes. The association exists on the continent of Europe without legislation, either as a limited or as a special partnership. Each kind may be formed with joint stock, and the shares will represent the interests of the partners. The special partnership is called *Société en commandite par actions*, or Commanditgesellschaft auf Actien; the limited partnership, *société anonyme*, or Actiengesellschaft. The vital difference between them was overlooked by Parliament. The exemption from unlimited liability in a special partnership organized as a joint stock company extends only to the members who take no part in the management of the association,[c] but extends to every member of a limited partnership so organized. Two evils resulted from the refusal of the courts to recognize the institute as part of the Law Merchant. First: They abnegated the judicial function, which consists in working out the principles of law into a coherent system, and brought about what they professed to abhor. They drove away applicants who, for refuge, went to the legislature, which permitted partners to organize as a company, and restrict their liability to the amounts contributed. Second: The community lost

the intelligent direction of the courts in working out the principles of partnership law. The security and efficiency, which result from the unlimited liability imposed by the commercial law upon the managing members of a special partnership association, have been abandoned. It is the want of this wholesome restraint, and of the caution induced by it in transacting business, that accounts for the exhibition witnessed, unfortunately on a grand scale, of speculation and corruption, by companies which have been improvidently substituted for special partnership associations. A further evil resulted from throwing upon the legislature the work which belongs to the courts. The exemption from liability, as it was acquired by statute, was mistaken for a State prerogative, and a joint stock company lost, in general estimation, its distinctive character as a private organization, and became the delegate of a public franchise. This misconception obliterated the distinction between a corporation and a company,[d] and led parties to seek incorporation, which was the avowed grant of a franchise. The universal resort to incorporation for private enterprises, led the State, from weariness, to abandon the grant of charters, and to permit self-incorporation under general statutes. The State, overtaxed by the applications for incorporation, abnegated its prerogative and deprived itself of an essential function. The State has lost its initiative in public enterprises, and has granted indiscriminately to private associations the sovereign prerogative, which, by right, can be exerted only for a public use, or for the common benefit of all.[e]

1. In his dissenting opinion, Pa. R. R. v. St. Louis, A. & T. H. R. R. Co., (§24, note 7) Mr. Justice BRADLEY urged that the ursurpation of a franchise was equal to a charter. This *reductio ad absurdum* is in glaring contrast with the refusal to admit a special partner's legal status, unless he sets it up by way of defence. *The plaintiff is entitled to assume that he is not a special partner, and to proceed against him as a general partner.* B special, C and D general, partners. A sued all three for goods sold the firm. B's defence: A special partner. A offered to prove B's non-compliance with statutory requirements.—Competent. Action lay on general liability as partners. It is only the defence which puts A to proof of B's failure to comply with the Statutes. Sharp v. Hutchinson, 100 N. Y. 533 (1885)

2. The Law of Limited Partnership, by CLEMENT BATES, 1886.

3. SWIFT puts the case of three sons, who were embarrassed by a command imposed by their father: "The paternal will was very "precise, and the main precept in it was with the greatest penalties "annexed, not to add to or diminish from their coats one thread, "without a positive command in the will. Now the coats their father "had left them were, it is true, of very good cloth, and besides so "neatly sewn, you would swear they were all of a piece; but at the "same time very plain, and with little or no ornament, and it hap-"pened, that before they were a month in town, great shoulder knots "came up; straight all the world wore shoulder knots; no approach-"ing the ladies *ruelles* without the quota of shoulder knots. . . . "Our three brethren soon discovered their want, by sad experience, "meeting in their walks with forty mortifications and indignities. ". . In this unhappy case they went immediately to consult their "father's will, read it over and over, but not a word of the shoulder "knot: What should they do? What temper should they find? "Obedience was absolutely necessary and yet shoulder knots ap-"peared extremely requisite. After much thought one of the broth-"ers, who happened to be more book learned than the other two "said, he had found an expedient. It is true, said he, there is noth-"ing here in this will, *totidem verbis*, making mention of shoulder "knots; but I dare conjecture, we may find them, *inclusive* or *toti-"dem syllabis*. This distinction was immediately approved by all; "and so they fell again to examine; but their evil star had so directed "the matter that the first syllable was not to be found in the whole "writing, upon which disappointment, he, who found the former "evasion took heart, and said, Brothers, there are yet hopes; for "though we cannot find them *totidem verbis*, nor *totidem syllabis*, I "dare engage we shall make them out *tertio modo*, or *totidem literis*. "This discovery was also highly commended, upon which they fell "once more to the scrutiny, and soon picked out S, H, O, U, L, D, E, R; "when the same planet enemy to their repose had wonderfully "contrived that a K was not to be found. Here was a weighty diffi-"culty, but the distinguishing brother for whom we will hereafter "find a name, now his hand was in proved by a very good argument, "that K was a modern illegitimate letter unknown to the learned "ages, nor anywhere to be found in ancient manuscripts. It is true, "said he, the word *Calendae* hath in Q. V. C. been some times written "with a *K* but erroneously; for in the best copies it has been ever "spelt with a C. And by consequence it was a gross mistake in our "language to spell knot with a k but from henceforward he would "take care it should be written with a C. Upon this all further diffi-"culty vanished. Shoulder knots were made out to be clearly *jure "paterno*." SWIFT'S Works, "Tale of a Tub," III Vol. 82, ed. 1803.

The courts took the statutory language, and spelt out the word N, O, N, D, E, S, C, R, I, P, T, for the special partner. They did not classify him as a partner, except to victimize him for the non-observance of any trifling formality, but they treated him as an anomaly in law. If the legislature had not enacted him a partner, the profession would have made him a creditor.[f] As it is, he runs the gantlet of the Profession.[g]

a. "Au fond, objectera-t-on que la limitation de la responsabilité aux "mises des associés est contraire à ce principe du droit civil d'après "lequel quiconque s'oblige tous ses biens? Mais ce principe "n'est qu'une règle générale, susceptible d'être amendée par convention; car il est incontestablement permis de limiter son engagement "à certain biens; cette limitation, qui devient la règle dans les sociétés "commerciales, serait valable à titre d'exception, dans les sociétés "civiles ordinaires, et obligatoire vis-à-vis des tiers si elle etait connue "d'eux. Or cette connaissance leur sera donnée au moyen de la publicité exigée par la loi commerciale." VAV., 's 348.

Special partnership is not a kind of partnership, but is a modification of general partnership. Marshall v. Lambeth, 7 Robinson La. 47 (1844).

Foreign special partnership recognized by comity. B, special, and C and D general partners, in Cuba, trading as C, D & Co. B, who had never acted or held himself out as a partner, failed to observe the statutory requirements of contribution in cash, and of recording certificate, which were held directory in Cuba. A lent the firm money in N. Y., and sued B as a general partner.—Judgment for B. Cuban special partnership recognized by comity. King v. Sarria, 69 N. Y. 24 (1877).

Foreign process against special partnership regulated by foreign law. B, general, and C, special, partners, who traded, in Massachusetts, in B's name, suspended payment. D, a Massachusetts creditor, attached debts due the firm B, in New York, Alabama and Arkansas, and recovered the claims. A, B's assignee in insolvency, sued D for the amount collected.—Judgment for D. Though equity would not let D obtain a privilege by attaching insolvent's property in another State, the law does not take away the privilege when thus obtained. The attachments against B bound the firm, because the Massachusetts Statute made B's name the firm designation, and, although without extra territorial force, is recognized as the law of the partnership. Though attachments invalid and payment by garnishees voluntary, A could not recover from D; the judgments cannot be impeached in this collateral suit. Special partner, if unknown, should no more be joined as defendant than dormant partner. Lawrence v. Bacheller, 131 Mass. 504 (1881).

b. Law of Partnership, by NATHANIEL LINDLEY, 1 vol. 6, *et seq.*

c. RENAUD, §13, p. 94.

d. "Confirmatio (apud Anglos 'charter') Societatis a Principe impetrata num ad valorem contractus requiratur, fluctuat sententia jurisconsultorum. Alii enim utique eam desiderant, alii omitti posse "aiunt, alii pro casuum diversitate modo hoc modo illud statuunt "verum esse. Re accuratius perpensa verius mihi hoc visum est. "Distinguendae sunt societates innominatae ex diversitate operis, "quod faciendum suscipitur. Illae enim, quarum finis est, ut res "aliqua negotiumve ad imperantis jura pertinens expediatur, valide "iniri absque Principis assensu nequeunt. Ita ad rem metallicam "exercendam, ad salinas struendas non sufficit privatorum conventio, "quoniam regalibus ista accensentur; neque ad canales fodiendos "ferreasve vias sternendas sufficit societas privata, quia territorio "opus est et inviti ad vendendos fundos domini expropriationis lege "compellendi sunt. Huiusmodi igitur societates validae esse absque "confirmatione non possunt, quia antequam haec impetrata est, "parum constat, liceatne opus perficere nec ne." *Societates Innominatae*, by Dr. FRED. FRANSC. FÜSSEL, ch. III, §3, *Lipsiae*, 1842. This

view is consistent with that of the Faculty of Leipsig jurists: "Quae "societatem anonymam statuit esse universitatem, additque, pactum, "quo constituantur universitates, jure Romano non insignitum nom-"ine peculiari, non aliud esse, ac quod in constituenda republica 'pac-"tum unionis et ordinationis' soleat dici; ipsam universitatem ab eo "inde momento existere, quo membra, se eam pro constituta habere, "declaraverint; confirmationem publicam nonnisi positivo jure Ro-"mano et particulari requiri, ideoque etiam absque hac a membris "ipsis coniunctionem illam pro universitate esse agnoscendam." *Societates Innominatae, supra*, §4, n. 23.

Das Actienwesen, von W. Auerbach, 1873, pp. 3–4.

e. "The General Assembly shall not pass any local or special law . . "creating corporations, or amending, renewing or extending the "charters thereof, . . . nor indirectly enact such special or local "law, by the partial repeal of a general law." Constitution of Pennsylvania, 1874, Art. III, §7.

f. *Special partner's interest a chose in action.* A, B and C, special partners, D general partner. On E's execution against A, sheriff sold his interest in the firm to B, without levy upon or view of the stock. A claimed the share.—Recovered. His interest a chose in action, and, therefore, not subject to execution. There could be no levy on the stock to sell special, like general, interest, because special partner has no right of control over firm property. Resembles a debt rather than an interest in property, or even a share of corporate stock. Probably not a debt at all. Harris v. Murray, 28 N. Y. 574 (1864).

Special partner cannot claim re-payment of loan made apart from his contribution, until firm creditors are satisfied. Special partner, A, lent money to the firm beyond his contribution, and claimed as a creditor against the fund in the hands of B, the receiver. Defence: Statute postpones A to firm creditors. Reply: Loan made not as a contribution, but as an independent transaction.—Judgment for B. Statute makes no distinction, but puts all loans on the footing of the contribution. White v. Hackett, 20 N. Y. 178 (1859).

g. *Exact compliance with statutory requirements necessary to protect special partner.* B, general, and C, special partner. All the statutory requirements were observed, but the advertisement contained a misprint of the amount contributed by C, which was announced as $5,000, instead of $2,000. A sued C, as general partner, for goods sold to the firm.—Recovered. General liability the penalty for the inaccuracy. Argall v. Smith, 3 Denio 435 (1846).

A et al. sued B, special partner in C & Co. Affidavit of C, for renewal of partnership, stated that B had contributed $50,000, and it "remains in the common stock of said firm."—Liable. Affidavit insufficient, because it did not explain the state of the contribution. Haddock v. Grinnell Manuf'g Corp'n, 16 W. N. 549 (1885).

Change of place of business, without recording certificate, charges special as general partner. Insolvency of surviving partner, found but not defined, presumed to be total after judgment against surviving and executors of deceased partner. B, general, and C, special, partners, in New York. Firm moved its place of business to Kings Co., but did not record a certificate there. A sold goods to the firm in Kings Co., and sued B and executors of C. Referee found B insolvent. Defence: Insolvency ambiguous. Plaintiff must show total insolvency, or execution unsatisfied.—Recovered. C liable as general partner. C should, at the reference, have compelled A to prove that

he had exhausted B's resources. Afterwards, total insolvency is presumed, in order to uphold the judgment. Riper v Poppenhausen, 43 N. Y. 68 (1870).

Special partner becomes general by disposing of firm assets after its failure. Contract to pay firm liabilities not merged in indemnity to firm and to contracting partner. C agreed, in April, 1872, to furnish means and merchandise to carry on firm of B & Co., and indemnify A, the special partner, if he would continue his contribution for two years. B & Co. failed in May, 1872, and all the partners were adjudged bankrupts. C assigned for creditors, to D & Co., and all his creditors joined in the deed in November, 1872. Then a settlement was made among all the parties: A gave up the agreement of April, surrendered claims against C, agreed to pay commercial paper negotiated for B & Co., and paid C $37,000. The bankruptcy proceedings were dismissed by consent. B & Co. assigned their assets to C, who agreed to pay B & Co.'s debts and indemnify B & Co. and A. D & Co. guaranteed C's contract. A sued D & Co. Defence: As A did not pay debts, he cannot claim reimbursement.—Contract to pay independent of indemnity, and covered liabilities. A, by joining in assignment of B & Co. and advancing money to C, became liable as general partner, and, as such, had been adjudged bankrupt by final decree. A obtained relief, C firm assets and A's cash to meet his liabilities, and D & Co. possession of C's property. Guaranty part of settlement. C would have recourse in equity for endorsement made for B & Co. Farnsworth v. Boardman, 131 Mass. 115 (1881).

Creditor of general partners, without knowledge of the special partnership, may hold firm assets received in satisfaction of his claim against a firm creditor's attachment. A dissolved partnership with B and C, as carriage makers, and took their note for his balance of account. B & C continued the business alone for a month, and then formed the new partnership of B & Co., with D, E and F as special partners. B and C sold A, who did not know of the special partnership, three carriages, in payment of their note, which A surrendered to them. G, creditors of the special partnership, attached the carriages as its property, and A replevied it. Defence: B and C could not appropriate firm assets to the payment of their separate debt.—Recovered. The special entrusted the general partners with authority to dispose of the firm property as their own, and their separate creditor may receive from them, in payment of his debt, firm assets, which he believes, from their apparent ownership, to be their individual property. A and G both innocent parties. G is identified with B & Co., who enabled B and C to deal as owners, and must bear the loss. Locke v. Lewis, 124 Mass. 1 (1878).

The whole machinery of the Statute has but one purpose, that is, to notify strangers, who is the special partner, and what is his contribution.[h] If they already know these two facts, their knowledge dispenses with the notice for which the Statute provides. The Statute could not be misunderstood, for it enacted the commercial principle, which prevailed everywhere else, in order to make it a part of the Common law. The beacon light of experience was equal to the illuminated pathway of the Israelites: "The Lord

"went before them by day in a pillar of cloud, to lead them "the way; and by night in a pillar of fire, to give them "light: to go by day and night."[i] Men trusted to the good faith of the judges in applying the language to business transactions. How the commercial world was deceived is shown in the business wrecks among special partners. Look at the method of construction resorted to by the courts. The Statute requires a contribution. The special partner is made to pay it, and his co-partners to swear to the payment on the date of the contract of partnership, or of its renewal, otherwise the payment counts for nothing. The special partner may be in Europe on that day. The impossibility is no excuse for non-compliance. If the special partner anticipates the difficulty, and obviates it, by giving his check in advance, he is denounced for seeking to defraud the Statute, and the partners are charged with perjury, although both check and affidavit relate to the date of partnership, and are good at that time.[j]

h. Statutory requirements, omitted in forming special partnership, must be constituents of it, in order to charge special as general partner. B was special partner, and received a percentage on gross sales, instead of a share in the profits. He once consulted with the general partners, and telegraphed the standing of the firm to N. Y. Minor requirements of the Statute were not observed in forming the partnership. A, et al., sued B, as general partner.—Not liable. Record of special partnership ample protection to creditors, and irregularities, not inconsistent with special partnership, disregarded. Telegram might have been sent by a stranger. Ulman v. Briggs, 32 La. An. 657 (1880).

i. 2 Moses xiii; 21.

j. Statement and payment of special partner's contribution must coincide in date with the contract of partnership. B special, C and D general partners. Certificate and affidavit, 23 December, 1870, stated amount of contribution paid in cash for partnership, to begin 1 January, 1871. B gave his check, 31 December, 1870, which was paid 2 January, 1871, the 1st being Sunday. A sued B, C & D on promissory note of firm.—Recovered. Certificate and affidavit not read as of the date to which they referred for commencement of the partnership. Durant v. Arbendroth, 69 N. Y. 148 (1877); 97 N. Y. 132 (1884).

§38.

If the contribution made to the firm by a partner consists of fungible property which does not belong to him, but which has been put into his hands for use, the owner cannot reclaim it from the firm.

The transfer of title by the partner to the firm does not exceed his authority, as it is a use by the partner in conjunction with his co-partners, and the firm acquires by the use a right to the property. If the owner deposits money, or its equivalent, with the partner for use by him, the deposit is in effect a loan, but not to the firm. A debt results from the use of the deposit by the partner in the business, and the owner must look only to the partner as his debtor. The firm, although it uses the deposit as capital stock, does not owe its value as a debt to the proprietor.[1]

1. *Firm's use of gold deposited with partner for use by him, does not charge the firm.* A sent gold dust from California to his sister B, the wife of C. D, the partner of C, urged both A and C to use it as stock, but A lent it to C, and it was used in the business. C died, and A sued D.—No action lay. The fund was contributed by C, and the firm was not liable for it. Donnally v. Ryan, 5 Wr. 306, Pa. (1861).

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§39.

The element of trust, if complicated with the contribution, changes the character of the transaction.

Upon what theory does the law charge a trustee for the profits which he makes by trading with trust funds? It has been said: The law does not suggest a breach of duty and impute it to the trustee, but adopts the natural inference that he is acting in the

performance of his duty. The profits belong to the beneficiaries, because the trustee acted for them in trading with the trust fund. The act being done on behalf of the beneficiaries, they are entitled to ratify it. The right of election results from the trustee's act of trading for them with the trust fund.[1] But the trustee's conduct does not admit of such an explanation. He is prohibited by law from doing the act which is alleged to be a performance of duty. With the prohibition staring him in the face, he refuses to invest the fund in legal securities, as he is directed to do, and disobeys the injunction of the law. He proceeds a step further, and embarks in a speculation with the trust fund. The act of the trustee is a violation of law and a breach of the trust by him. The only performance of duty which he could make would be a legal investment of the fund. Anything else is the non-performance of duty.

A partner, therefore, who holds trust money, with no authority to contribute it to a firm, and who does nevertheless employ it for that purpose, commits a breach of trust.[2] The trustee might invest the trust fund in a partnership without an intention to defraud the *cestuy que trust*, but the contribution would not be a lawful investment. There would be no tangible security for a return of the fund, not even a promise to repay it by the partners. The money would be at the risk of the business, in other words, a speculation.

1. LORD ARDMILLAN'S opinion, Laird v. Chisholm, 30 Scottish Jur. 584 (1858).

2. *Ward may reclaim the funds which guardian used as a partner in his firm, from assignee for creditors.* B, guardian of A, put ward's money in the firm of B & C. B died insolvent, and his sureties were also insolvent. C assigned for creditors to D. A brought bill against C and D, to recover trust funds in preference to creditors.—Recovered. Carter v. Lipsey, 70 Geo. 417 (1883).

§40.

The ordinary consequence which follows the misuse of trust funds, enables the *cestuy que trust* to reclaim from the firm the money contributed to it by the trustee..

It is only a purchaser for value and without notice who prevents a pursuit of the funds. He is protected, and the *cestuy que trust* then looks to the consideration as a substitute for the property. The firm cannot deny the *cestuy que trust's* right, and claim to be considered a purchaser for value and without notice, from the partner, who contributes the trust funds.[1] The firm is not a person existing apart from its members, but an aggregate of the partners. The contribution does not pass to the co-partners, and enable them to claim it as purchasers, for then it would be their separate estate. So far as the separate estate, from which the consideration moved, is involved, they are entitled to protection, and would be exonerated from liability, were it not for the nature of the C. L. contract (§ 102). But the contribution remains the property of the contributing partner, shared, during the partnership, with his co-partners. The *cestuy que trust*, in reclaiming it from the firm, takes it back from the trustee, and from his co-partners, who have paid nothing for it out of the joint estate, but simply added something to it in the joint stock. The firm, therefore, is a volunteer, and by the doctrine of equity the trust fund, if it is identified, may be followed into the hands of the trustee, or of a volunteer, or even of a purchaser for value, if he had notice of the trust.

The character of a partnership is often overlooked, and the attributes of a person are inadvertently given

to the firm. It is said that a partner may lend trust funds to his firm, and if his co-partners are ignorant of the breach of trust committed by him in making the loan, they will not be affected by the breach, but will be entitled to hold the funds as firm property, for which they will be indebted only to the co-partner as a lender,[2] who will alone be liable to the *cestuy que trust*.[3] But the distinction taken between a loan and a contribution of trust funds by a partner to his firm, has no foundation. If there were any difference, the tort of a partner in acquiring his contribution would affect his co-partners the least. Inasmuch as the contribution is an independent transaction, anterior to the partnership, it might be urged that the co-partners should not be implicated by the partner's fraud. But no such argument could be made when the partner procures money after the firm has been formed.[4] He cannot act in an independent capacity, for he represents the firm, which must necessarily be affected by his knowledge acquired in the very transaction.

1. The suggestion of Mr. JUSTICE LINDLEY, 1 Partnership 329.
2. LORD JUSTICE JAMES speaks of the election between interest and profits in the case of "an actual loan by a trustee in breach of trust to himself and others," meaning partners. Vyse v. Foster, L. R. 7 Ch. 334 (1872).
3. *Partner's use of trust funds in his firm does not charge it.* B, in New York, and C, in New Orleans, partners. B went surety for A. Upon debtor, D's, default, he gave for A's security an order to B, though in B & C's name, for merchandise, which B, without C's knowledge, sold and applied for the firm. A's assignee brought assumpsit against B. Defence: Non-joinder of C.—Recovered. B's separate debt, and C not made a co-debtor by application of trust fund for firm. Jaques v. Marquand, 6 Cowen 497, N. Y. (1826).
4. *Trust funds lent to a firm by a partner charges it, although repaid to him and subsequently embezzled,* B & C, partners. B, receiver of A & Co., lent its funds to his firm, with C's knowledge. The funds were returned to B, and embezzled by him. A & Co. brought bill against B & C.—Liable to account. Misapplication charged firm, and repayment to partner no exoneration. Ryan v. Morrell, 21 Reporter 273, Ky. (1885). *Infra* §41, notes 1 and 4.

Trust funds put by trustee partner in his firm creates a firm liability. B, administrator, and also guardian of E, lent funds of decedent to firm of B, C & Co., which became insolvent, and executed a note for the loan, and a trust-deed of lands to secure it. Firm creditors attached the lands. A foreclosed.—Recovered. Firm liable for fund, and security binding. Bush v. Bush, 33 Kan. 556 (1885).

Partner's conversion of trust funds to firm use makes the partners liable to the cestuy que trust. B, United States deputy collector of internal revenue, with knowledge of C, his co-partner, converted money received by him to the use of firm B & Co., which, becoming insolvent, executed a judgment bond of indemnity to D *et al.*, sureties on B's official bond. Judgment entered up, and firm stock sold. A *et al.* enjoined E, sheriff, from paying proceeds of execution to D *et al.* —Bill dismissed. Wharton v. Clements, 3 Del. Ch. 209 (1868).

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§ 41.

The *cestuy que trust* may waive the tort of the partner in misappropriating the trust funds, and recover of the firm in assumpsit the proceeds used in the business.

The tort of a partner does not implicate his co-partners, unless they derive a benefit from the wrong which he has committed. If the firm received the proceeds of the tort, the defrauded owner may waive the tort, and recover the proceeds, or its equivalent. The recovery is not founded on a contract, or a debt. The proprietor simply follows his property into the hands of the firm, which has no title to it, and compels a surrender of the possession. If restoration can not be made, an equivalent is exacted, in lieu of the property.[1] The co-partners can make no defence to the reclamation of the owner, as they gave no value for the proceeds, and though they had no knowledge of the fraud, equity requires a purchaser for value to intervene before it will arrest the proprietor in the pursuit of his property.[2]

Following trust funds into partnership seemed natural among the Romans, because no individual liability of an innocent partner was involved. The firm has received the funds, and is obliged to restore them, with the penalty, or profits acquired by their employment. The right of the *cestuy que trust* to waive the tort, and proceed directly for the money, is a clear equity. The collision of rights occurs when an innocent party is brought into the transaction. The partner who was not concerned in the breach is made to pay the money, though this would simply make him the victim, instead of the *cestuy que trust*. The loss is shifted from one innocent man to another. The Romans limited the recovery to partnership assets, and this makes a simple case. If we could limit the firm liability, when once admitted, to the joint effects, the problem would be solved. Should the innocent partner pay for his co-partner's theft? It would seem not, if he did not, in the language of ULPIAN,[3] know of it. If ignorant of the fraud, he should be exempt from personal liability. The rights being equal, the loss would not be changed, but would remain where it originally stood. The liability, *in personam*, of a partner arose only when his co-partner put the consideration into the firm assets. Then the firm received the benefit, and as each received the goods in fact, each must restore. The actual receipt by the firm is the fact which fixes the partners' liability.[4]

1. *Partner's use of trust funds in the firm charges his co-partners.* B, in Philadelphia, and C and D, in New York, partners as stock-brokers. D, executor of A, without B's knowledge, except in one instance, lent securities of A's estate to the firm, which used them in its business. On its failure, A's administrator d. b. n. sued B in assumpsit.—Recovered. B liable, though without notice of the borrowing or conversion of the securities. Guillou v. Peterson, 8 Norris 163, Pa. (1870).

2. In New York the firm is regarded as a purchaser for value

Trust funds cannot be recovered, although identified. B & C, partners for purchasing and conducting a hotel. B contributed trust funds of A, without C's knowledge. B sold his share to D, who had no notice of the trust. A sued for as much in the value of the hotel as his money had purchased. D's defence: A, B's creditor, and entitled only to account of B's interest.—Defence sustained. D, a bona fide purchaser for value. Hollemback v. More, 44 N. Y. Sup'r Court, 107 (1878).

The *cestuy que trust* cannot prove even against the joint estate. Millett v. Stringer, 17 Abb. Pr. 152, N. Y. (1858).

3. D. 17, 2, 55.

4. *Firm's receipt of trust fund charges the partners for its return.* *Cestuy que trust* sued surviving partner in assumpsit, for trust moneys which his deceased partner had employed in the business without his knowledge.—Recovered. Having received the benefit of the trust fund, the defendant should make it good to the plaintiff. Welker v. Wallace, 31 Ga. 362 (1860).

§42.

The *cestuy que trust* is entitled to recover not only the trust fund employed in the firm, or contributed to it by the trustee partner, but, in addition to it, the share of profits which the firm made by the use of the fund.

The authorities made a distinction between the trustee partner and his co-partners. In this aspect, the co-partners do not commit a breach of trust, because they are not trustees. No obligation rests on them to invest the property of the *cestuy que trust* in authorized securities, and the prohibition not to trade with trust funds is not directed to them. The beneficiaries may reclaim the fund, with interest, because it does not belong to the partners, and the law will follow it into their hands. They do not act in a fiduciary capacity by appointment, and unless they had knowledge of the trust and of its appropriation by the trustee,

they will not be charged for diverting the fund to unlawful uses.[1] If, however, the partners had such knowledge, they become trustees *ex maleficio*[2] by cooperating in the breach, and are accountable for the profits which they make by trading with the trust fund.

The distinction results in a curious refinement. The fund is severed, and the partners are treated as strangers to each other with reference to it. The trustee partner is not liable for his co-partners' share of the profits which the firm made by the use of the trust fund. He is, as an individual, derelict, and is charged, on account of his tort, with his share of the profits, but his co-partners are not compelled to account to the *cestuy que trust* for their shares. The co-partners are liable to the *cestuy que trust* only for the fund, with interest.[3] The theory, if it could be maintained, involves a *pro tanto* dissolution of the firm. The trustee partner is made to occupy the double position of a stranger and of a member of the firm. But as has been shown (§40) he represents the firm in his breach of trust, and charges his co-partners for the tort, which he commits. They can no more retain the fruits of the fraud than he can, and they must answer for them to the defrauded *cestuy que trust*. The ignorance of the co-partners would be a difference only as to his separate estate, if the procedure distinguished between joint and separate assets.

But the segregation of the trust fund from the joint stock could not be sustained on partnership principles. The profits, in theory, correspond with the contributions, and originally the law made the adjustment. Subsequently, the correlation was left to the partners,

but the law assumes that they adjust the profits in proportion to the contributions (§ 56). The contribution, therefore, of the trust fund is matched by an equivalent contribution made by each of the co-partners. The profits of the trust fund, if divided among all the partners, entitle the trustee partner to share, by virtue of his trust contribution, the profits of all other contributions. The result is equivalent to giving him all the profits of the trust fund. This conclusion has also been worked out by HAMILTON, on business principles.[4]

1. *The trustee partner answers for his share of the profits made by the firm in trading with the trust funds, but not for the shares of his co-trustees or co-partners. They answer only for principal and interest.* Articles provided for payment of partner's share in instalments within 18 months after his death. D died, appointing his partner, C, and others, trustees and executors. C alone acted, substituting three co-trustees, who made him their agent. C did not withdraw D's interest, but left it in the firm. The beneficiaries claimed the profits made in the business from C, and from his co-trustees, and also from his co-partners, although they were not parties to the proceedings.—Recovered from C, who was solvent, profits made by him. Co-trustees would be liable only for debt and interest (dissent would charge them jointly with C), as would his partners. Laird v. Chisholm, 30 Scottish Jur. 582 (1858).

Co-trustees are identified with the trading trustee, and are liable for the profits which he earned by means of the trust fund, although they received nothing. What is necessary in order to charge a trustee for the profits made by trading with trust funds? Must the profits be received by him? If co-trustees did not use the fund, and were not enriched by the profits, they could not be said to retain the profits which belonged to another, for they did not receive any profits. The question may be asked: Do they not answer merely for negligence in not preventing the trustee from trading with the fund? The liability for negligence would be to make good the loss occasioned by the trading trustee. This would be compensation or indemnity, and include the principal sum employed by him in trade, and the interest upon it. Would the co-trustees, who made no profits, be punished, and a penalty inflicted upon them after they had made up the loss to the *cestuy que trust?* This would

make the co-trustees take money out of their own pockets, in order to enrich the beneficiaries beyond the loss. The answer is: The trustees are a unit. All are deemed to receive the profits, because they have the control, and are charged by law with its exertion. They do not answer for the profits made by a different person, but for the profits received by themselves through a member identified with them.

2. LORD CAIRNS, Vyse v. Foster, L. R. 7 H. L. 333-4 (1874).

Partners trading with co-partner who contributes trust fund are liable to cestuy que trust for interest, or the profits of its employment. B, executrix of husband, C, in 1854, took his assets for her contribution to firm, which she formed, stipulating for profits in proportion to contribution. Different firms succeeded first until 1864, when B went out. She had declared trusts of fund 22 February, 1862, and agreed to indemnify co-partners. She became bankrupt. Children of C brought account. D partner from beginning, and E from 1 July, 1862.—Decree. They appealed.—Affirmed. Plaintiffs entitled to enquiry, in order to elect interest or profits of testator's assets employed in trade. An appropriation, not a loan, of trust fund, which partners acquired with knowledge of the breach of trust. Flockton v. Bunning, L. R. 8 Ch. App. 323 n. (1864).

3. *Cestuy que trust entitled only to trustee partner's share of profits made by use of trust fund.* By settlement, B and C, trustees were directed to call in debt of £350 from banking firm, of which B was a partner. The debt remained uncollected for 16 years, when the firm was dissolved. C died during the interval, and D was substituted co-trustee. *Cestuy que trust* brought bill against B for profits made by use of the trust money.—Entitled to only 1-3, or B's share of firm profit, and, therefore, interest with annual rests allowed at election. Jones v. Foxall, 15 Beav. 388 (1852).

Contract for purchase of deceased partner's share by surviving partners executed, in spite of terms unperformed and price unpaid for 23 years, if sale, apart from its formalities, intended by the parties; deceased partner's legatee could not impeach sale and claim profits because executor a partner. Partners B & C, with capitals respectively £90,000 and £40,000, had received equally their father, the firm founder's, interest. Remaining partner, D, had £7,000 capital, and new partner, E, nothing. Each received 5 per cent. interest on his capital and accumulations, and B 6-16, C 5-16, D 3-16, and E 2-16 of profits. At different periods profits were re-adjusted among the old and incoming partners, but not according to their contributions. By articles, surviving partners should take deceased partner's share at price fixed by last account of stock, and pay in instalment notes, maturing in two years from his death. B died in 1855, making C, his son G, who subsequently became partner, and H his executors. They left B's share in firm at 5 per cent. interest, added annually to principal, against which *cestuy que trust* drew, like other members of the family, against their deposits. Eight of the nine legatees, testator's children, and the annuitants, his widow and father, ratified the sale. But A, the youngest child, who attained majority in 1865, brought bill against C, in 1870, for profits.—Dismissed. Articles effected a sale of B's share to co-partners, who became debtors for the price. Though neglect to withdraw, a breach of trust, which

benefited firm, appointment of partner executor, which extinguished debt at law, and left it only a debt in equity released executors from performance of terms available only for legal debts, and making son co-executor, who could not enforce terms at law, also indicated a dispensation of executory terms, in order to preserve ancestral business. By ratification, others made transaction lawful with them. Were capital the only source of profits, the children's quotas, principal of annuities and deposits would be counted with partner's contributions, and A's share would be only her share of the aggregate; but where capital is a factor at all, it is never the leading element in profits. The main source, apart from the good-will, is the partner's capacity. Their shares were not based on the amounts contributed, but on their quotas of the good-will and their services. Interest was the measure of capital for contributions and loans. Recovery could be only against executor-partner, and for proportion of profits made by him with trust funds. To charge him for co-partners' profits would not be equity, but punishment. Vyse v. Foster, L. R. 8 Ch. App. 309 (1870).—Affirmed on appeal. Testator dispensed with performance, of which time was not the essence. Delay would not justify inference of collection and a re-loan. Bill incongruous; could not rescind against executor partner sale, which subsists for surviving partners; claim for interest on surviving partners' shares as a creditor for the price and for profits out of executor partner's share as a copartner. Query: Active breach of trust would charge all partners aware of it, but not one for all. L. R. 7 H. L. 318 (1874).

A rough estimate is sometimes made for convenience sake, in order to avoid the trouble of ascertaining the constituent portions of the profits. An allowance is made out of the profits to the firm for services, and the compensation is deducted before the *cestuy que trust's* share is estimated. An allowance of 1-3 for management has been made in other cases, and adopted in partnership.

If decedent's business is carried on with his assets by administratrix, his creditor may compel her to account for 2-3 of the profits. B, pawnbroker, died, leaving $3,000 assets, with which C, his widow and administratrix, continued the business. She made $1,700 profits a year. A obtained judgment against B's estate for $6,400, and claimed payment out of the profits.—Entitled. C allowed $600 for expenses, and charged with $1,100 as net profits, aggregating in 14 years $15.000. Robinett's Appeal, 12 Casey 174, Pa. (1860).

Ward must elect in advance for fund put by guardian in his firm, either profits of business or principal and interest, without drawing court's opinion: whether the profits are of the guardian or of the firm, and with or without allowances to partners for management. B put, in 1866, ward A's money, $9,826.84, in firm of B & C, C going surety for B as guardian. Account in firm books gave credit, with 6 per cent. interest, carried to guardian's account every six months, after deducting A's maintenance. B lent trust fund, $39,000, to firm, in April, 1866. His contribution was $30,000, and C's $95,000. On 1st October, 1866, B's share increased from 1-3 to 1-2. The partners' capitals varied greatly in amount during the partnership, but no other change was made in their shares, the capitals for the time being carrying 6 per cent. interest. In 1880, on C's suicide, A attached B, who, *eo die*, paid over balance due A, $13,691.11. A claimed elec-

tion of principal and interest or of profits in B & C's business; but refused to elect until courts decided what share A had in firm profits. Orphans' Court allowed 1-3 profits to partners for management, 1-2 balance to each as his share of profits, and refused to surcharge B for C's share of profits. As A refused to elect, Orphans' Court entered decree for principal and interest. A's claim: Share as quasi partner in proportion to his capital used in business, without allowance for co-partners' services. Defence: Interest the direct measure in value of A's fund. Profits represent good-will of business and capacity of partners.—Affirmed. Séguin's Appeal, 7 Out. 139, Pa. (1883).

If the testator provides for a valuation and account of his share by the surviving partners, the inference is a sale of his share to them. An element is frequently introduced which changes the nature of the relation. The testator directs his partners to liquidate his share and pay over the sum to his executor. The direction effects a sale of his share to his partners, and converts the relation of trustee and *cestuy que trust* into that of debtor and creditor. The change saves the partners from liability as trustees *ex maleficio*, and charges them simply with interest upon the testator's share as a debt.[a]

The direction may be to liquidate the share within a given period, and pay it over to the executor, but a partner may be appointed the executor. The appointment deprives the estate of the right to enforce the payment at law, and makes the claim an equity. The courts infer from the appointment that the testator meant to leave the withdrawal of his share to the discretion of his executor. If he does not collect the debt, it remains in the firm on the footing of a loan.[a]

4. He sums up his demonstration in figures: "Let the total profits "equal 9, then, as each of the three partners has one equal third part "of the capital, the share of profits earned by each partner's capital "will equal 3. That is 3+3+3, the sum total of the profits so made, "each share of capital contributing 3, amounts to 9, the total profits. "If, then, the executor partner received simply the profits which his "share of capital makes, he would get 3; as it is, out of the three "made by his share of capital he receives 1 only, the other 2 being "divided equally between his partners. The argument against me "is, I submit: If he was paid the whole 3 which his share produces, "he should be made to account for that 3; but as all he gets is 1, he "shall only account for 1. I answer, he gets indeed 1 only from his "own share, but that is because at the same time he gets 1 from each "of the other two shares; therefore the net result is, that instead of "getting 3 and having to account for 3, he gets 1+1+1, which, arithmetically, equal 3, but still only subject him to the necessity of "accounting for 1." Critique "On the Doctrine of Vyse v. Foster," by G. F. HAMILTON, 3 Law Quarterly Rev. 211: 1887.

a. Laird v. Chisholm, *supra*. Vyse v. Foster, *supra*.

§43.

The difficulty of ascertaining the share of profits attributable to the capital in a business, and especially in a partnership business, does not prevent the *cestuy que trust* from reclaiming, with his money contributed by the trustees, the profits gained by its employment.

The general rule that a trustee must account for profits made with trust funds applies to partnership. The mystery of the elements involved in the production seemed to form a barrier to an investigation. But unless the right to make inquisition is acknowledged, the trustee would take advantage of his own wrong. He could create the complication, in order to profit by it. Equity would abnegate its prerogative if a trustee could defy its powers and neutralize its process. The suggestion could not be entertained by a chancellor. The decree for an investigation must be granted.[1]

What part of the profits is the product of capital must be left open for investigation in each case. It being established that the principle of equity extends to funds used by a firm, and entitles *cestuy que trust* to elect either profits or interest in return for the employment of his property, the question presents itself: What part of the profits is made by the capital? The query suggests another: How many sources are there of profits, and is there any fixed proportion for the co-operation of the various factors? The ratio, it is obvious, may vary with the kind of business.

In one class, the estate of a deceased partner might be entitled to the share of profits which the partner had while living. The business might consist in dealing with patents owned by the deceased partner. His property formed the basis of the firm business, and continued for his estate the share of the profits which he enjoyed in his life-time.[2] In like manner the good-will and connections of the firm may

constitute the foundation of the business. The deceased partner's estate shares the profits which result from the continuing operation of the original cause.[b] So a partner might contribute the capital and his co-partner his services. Upon the copartner's death before a good-will and connections were established, his share of the profits would also cease, and go to a successor, who replaced his services.

In a different class the capacity and services of the partners may be the chief elements of success in the business. The business of the partnership might require no capital, and trust funds deposited in the firm would earn no part of the profits.[c]

The question is not, however, an alternative of a contribution earning all the partner's profits, or earning none of them. The capital generally plays an intermediate role, co-operating with the other factors in earning profits. The capital makes a part of the profits, or it would not be contributed to the firm. But the nature of the business, the good-will and influence attached to it, the capacity and services of the partners, must be taken into account, as well as the capital contributed by them. No rule can be laid down which will work out a uniform rate in the product when the factors combined to make it do not remain fixed, but vary in the combination. The contribution itself may vary in amount, and often does vary, without affecting the ratio of profits which the contributing partner takes.[d]

1. *Difficulty of ascertaining profits of trust money, no answer to enquiry.* B and C, executors, who had authority to carry on testator's business for 6 years, continued it for themselves, and in settlement of various claims of the estate allowed 5 per cent. interest on the amounts received. The sums were put into their business. *Cestuy que trust*, A, brought bill for account of profits.—Account decreed. Docker v. Somes, 2 Mylne & Keene 653 (1834).

B, an executor, continued testator's business, and retained testator's funds, which he employed in the business. B traded at first alone, and then in partnership with different persons. A asked for account of profits.—Account decreed. Palmer v. Mitchell, 2 Mylne & Keene 655 (1834).

a. *Use of partner's share after dissolution charges continuing partners for retiring partner's share of the profits.* B, C & D manufactured pumps in partnership, under original patent issued to B. B became bankrupt. C & D continued the business without making a settle-

ment. A, assignee of B, brought bill for his share of the profits. B was indebted to firm, and continuing partners had increased the capital.—Decree. As the co-partners did not settle with B, the original adjustment continued unchanged. Crawshay v. Collins, 15 Ves. 218 (1808).

b. Rate of deceased partner may continue with the business. Articles allowed C to continue business on B's death, and take 2-3 profits, provided he secured B's capital, and made new agreement with estate. B made his partner, C, his widow, D, and another executors. B had 7-10 profits in one branch and 1-2 in other branch. C disregarded provisions. He paid 5 per cent. on testator's money. *Cestuy que trust* demanded account of profits.—Account decreed. Willett v. Blanford, 1 Hare 253 (1842).

c. Trust fund charges firm for profits only if a constituent of firm profits. Solicitor, B, with power to sell and invest for A, deposited proceeds of sale with bankers, to credit of B's firm. A demanded account.—Profits refused, because money not employed in solicitor's business, which required no capital. Interest allowed. Burdick v. Garrick, L. R. 5 Ch. App. 233 (1870).

d. Supra §42, n. 3.

Part II.

The principles which regulate partnership during its existence.

CHAPTER I.

THE CONSTITUENTS OF PARTNERSHIP.

§44.

Partnership liability at the Common law takes the form of a joint obligation.

By the Commercial law of Europe every joint act in trade was a partnership. In England, however, there was no partnership, except in a joint undertaking to buy and sell, but the measure of a partner's liability was that which obtained in all cases of joint obligation.[1] With reference to third persons, a partnership thus became a species under the genus of joint obligation.[2] In a proceeding, therefore, to charge one person with a liability in conjunction with another, the issue is not necessarily upon the existence of a partnership between them, but upon the performance of an act to which the law attaches a joint obligation. When a man is sued for an act performed in conjunction with another, he is liable for his acts as if performed alone. To admit the plea of no partnership as a defence, and as a corollary to compel the plaintiff to prove the existence of the relation, abrogates the law by displacing the point of controversy; which is made

to turn upon the fact of partnership *inter se*, instead of upon the liability of a man for his acts. The change reverses the order of proof. Every person who performs an act is liable, whether he is a partner or not.[3] To exculpate himself he must prove that he did not perform the act at all, or, if he did, that he was merely the agent or instrument of another, who is the principal. The burden of proof is upon him. The plea that no partnership exists, when made by him who did the act, does not meet the cause of action. The exaction of the law is the proof that he was understood to act as an agent. In accepting a denial of partnership as a defence to the cause of action, the claim is made equivalent to an averment of partnership *inter se*, and the fact must be proved by the plaintiff. The defendant might have made no contract of partnership, nor had any intention to become a partner, and the plaintiff who joins issue upon the existence of a partnership *inter se*, will be unable to prove it. The defendant, although a principal in the transaction, and bound in law to disprove his liability, does, in fact, prove nothing, yet defeats the plaintiff's recovery.[4]

As partners are merely joint obligors, a firm name is not necessary in pleading.[5] The law looks for the principals in the transaction, and not for names or phrases. The mention of partners "trading as" is surplusage. The name is simply a brief designation of the individuals who use it for their convenience. A partner might sign the names of his co-partners in full,[6] or if they failed to select a firm name, select one for them.[7] Firms may trade in partnership, each using its own name for the transactions made on joint ac-

count. A common name would be both inconvenient and uncalled for.[8]

1. The test, *ex contractu*, is a joint interest in the contract. The rule of liability for contractors who are not partners is thus stated by HAMMOND:

"If the benefit, right or property conferred by the contract belongs "as between themselves jointly to both * both are jointly liable." A Practical Treatise on Parties to Actions and Proceedings Civil and Criminal; and of Rights and Liabilities with reference to that subject, by ANTHONY HAMMOND, 1822, p. 62.

The joint liability, *ex contractu*, is thus explained by Judge HARE:

"Agreeably to the English law, persons who enter into a joint ob- "ligation are as much bound for its entire fulfilment as if the obliga- "tion were several. The suit and judgment should regularly be "joint, although this is not essential in the absence of a plea in "abatement, but the goods of each co-contractor may be taken in "execution for the whole debt." The Law of Contracts, by J. I. CLARKE HARE, LL. D., 1887.

A joint interest makes the parties interested liable, whether they are partners or not. They are co-principals in the transaction, and are liable because they are principals. This is explained by C. J. DOE, who, however, must not be understood to mean that all co-principals are partners. The object of his exposition was to demonstrate that all partners are co-principals, and the remark that all co-principals are partners should be limited to trade, or business transactions, in which the joinder of principals makes a partnership. In other instances, where a partnership is excluded by the nature of the transaction, co-principals are nevertheless liable for their joint acts. The difference is in the powers implied from the joinder. A partnership carries the powers originally exerted in trade. A joinder not in trade creates no implied authority in the co-principal. The joinder is limited to the act itself. Thus a joint purchase, either of real or of personal property, charges each purchaser for the entire price, although there is no partnership between them. The joint use and possession of property charges the possessors for the use and enjoyment, without reference to their being partners (§46, n. 2). Wherever a partnership is not admitted on account of the nature of the transaction, the joinder of principals charges them, nevertheless, with a joint liability.

Referring to a case put, where A employs B to make a purchase in B's name for him (A), upon a secret agreement between A and B, that A is not to be responsible to the seller for the price, C. J. DOE says:

"A difficulty arises from an ambiguity in the terms, 'A employs B "to make a purchase in B's name for him (A).' If this means that A "is the principal and B his agent, A is liable because he is the prin-"cipal. Edmunds v. Bushell, L. R. 1 Q. B. 97. If it means that B, "as principal, is to buy the property of C, and then sell it to A, A is "not liable to C because he is not the principal. The question of A's "liability is the question whether, in the contract of purchase from "C, A is in fact the principal, and B his agent, or whether B is the "principal, who, after he has bought the property of C, is to sell it "to A; whether the title passes directly from C to A, or from C to B "and from B to A; whether there are to be two successive purchases "of the same property, or only one; whether (in the contract of "purchase from C) A or B is the purchaser. This depends (so far as "A's liability is concerned, and aside from fraud and estoppel) upon "the understanding between A and B. If they understand the title "passes directly from C to A, and not through B as an intermediate "purchaser, A is the principal, B is his agent, and A, as the pur-"chaser, is bound to pay C for the property which he buys of C. A's "denial of the fact that he is the purchaser, has no more effect than "his denial of any other fact; an agreement between him and B to "deny the fact, does not alter the fact; A, being the purchaser, is "responsible as the purchaser for the price; he is liable upon the fact, "and is not discharged from his liability by an understanding between "him and his agent that the fact should not be disclosed or should be "denied. A purchase of goods is a sale; and a sale is something "more than the vendor's parting with his property. It includes pay-"ment made, promised or in some way provided for by the other "party to the contract. The buyer, *i. e.*, the principal who buys, is "necessarily a payer, unless the vendor agrees he shall not be. If "the agreement between A and B is made known to C during the "negotiation, and he expressly or impliedly agrees not to look to A "for payment, he is bound by his agreement; but he is not bound by "a secret agreement between A the purchaser and B the purchaser's "agent, that A is not to pay C for property bought by A of C. When "C discovers that A is the buyer, he is not deprived of all the benefit "of that fact by the undisclosed agreement *inter alios* that A is not "to pay for what he buys. That agreement does not make the agent "B the purchaser in fact, nor relieve the purchaser A from his part "of the contract of purchase made with C. The agent, holding him-"self out as the purchaser, is estopped to deny, as against the vendor "C, that he is the purchaser. But the secret agreement between the "real purchaser and his agent, that payment is to be made by the "latter and not by the former, is no part of the contract of purchase: "it is merely an extraneous executory agreement *inter alios* to which "the vendor is not a party. C is a party to the contract of purchase; "and if A is the purchaser, he is liable to C because he is the pur-"chaser. The fact that he is the purchaser is the material thing; "the non-disclosure of that fact, so far as his liability is concerned, "is immaterial; his intention not to pay is as immaterial as it would "be if he had held himself out as a purchaser, and had omitted to "disclose the fact that he intended not to pay. The question whether "A is a principal and B his agent, that is whether A authorizes B to "make the contract in his behalf, is often a difficult question of fact.

"And if B is a principal, the question whether A is a principal is the "same, and may be as difficult, as it would be if B were not a prin-"cipal. If B is a principal, the question whether A is a principal is "called a question of partnership" (or co-principalship); "if B is not a "principal, the question whether A is a principal is called a question "of principal and agent, or agency. The legal character of the ques-"tion whether A is a principal, is not altered by the circumstance that "B is or is not a principal, nor by the circumstance that it is called "in one case a question of partnership" (or co-principalship), "and "in the other a question of agency. And as that question is not "affected by the name given it by the tribunal called upon to decide "it, so it does not depend upon the name given it by A and B, or "both of them." Eastman v. Clark, 53 N. H. 292 (1872).

2. The pleadings disclose the classification.

Narr. against defendants sufficient, without calling them partners, if cause of action joint. A brought assumpsit against B & C, without averring that they traded as B & Co., and, under common counts, proved note signed B & Co. by B.—Judgment. Cause corresponded to action which was joint, and, as defendants need not be partners, the designation would be surplusage. Hawley v. Hurd, 56 Vt. 617 (1884).

Joint act sufficient to charge parties jointly. A sued B & C, mill-owners, for equipment, which he furnished mill.—Joint contract, express or implied, sufficient for recovery without proof of partnership. Sager v. Tupper, 38 Mich. 258 (1878).

3. *The sharer of profits is a partner, and the sharer of gross earnings, though not a partner, is liable for his acts.* B, owner of a lighter, let it to C, a lighterman, who agreed to work it and, by the first evidence, to share the profits; by later evidence the gross earnings. A sued C for repairs ordered by him.—Liable, because he ordered repairs. If gross earnings intended, sharing them would be a mode of compensation for wages which might be received, although no net profits were made; if net profits intended, B and C would be partners. Dry v. Boswell, 1 Camp. 329 (1818).

Buyer liable for goods alone, or with undisclosed co-principal. B, who kept a drug store at Cherokee, bought goods of A and stocked a store at McCune. He agreed to give C all the profits above 12 1-2 *p. c.* for managing the branch. A sued B for price.—Recovered. B liable, either as sole or joint proprietor. Woodward v. Clark, 30 Kan. 76 (1883).

4. *Joint contract to pay.* A and B engaged C to build a mill. B was partner with D, and paid for mill with firm funds, with the knowledge and assent of A. When B & D dissolved, B promised, for himself and A, to repay. D sued both, as partners, on this promise.—A not liable; joint undertaking with B constituted no partnership. Porter v. McClure, 15 Wend. 187 (1836).

The court in this case was of opinion that, primarily, A and B were jointly liable, under the circumstances, for the draft upon the firm funds of B & D, but that B, the common party (not common partner), prevented the enforcement of the demand at law; that the subsequent assignment by B of all his interest in the firm to D did not help matters, because suit must still be brought in the name of B & D if an attempt were made to recover on the original obligation. But this suit was brought in the name of D alone; hence the plaintiff must rely on a subsequent promise. He has proved a promise by B alone, though perhaps made in form as a joint promise by B and A. This

promise cannot bind, because, though he is a co-principal, he is not a partner, and his "liability is defined by his express contract." In other words, the plaintiff had a right without a remedy. He could not bring a general bill of account for a settlement of the affairs of B & D, and of A and B, because B & D had closed up their affairs, and there was nothing to be accounted for. The only difficulty, the equivocal position of B, had been eliminated from the case by the act of the parties. If B, by borrowing these funds with the knowledge and consent of A, had been able to charge both, were the plaintiff a stranger, why would not his promise to repay D bind both as soon as it appears that D is alone interested, for it is not, in reality, the creation of a new obligation, but the giving of precision to the old? A was admittedly liable to D in such a way as to sustain a subsequent promise without a new consideration. But a consideration, which, aside from the question of waiver, will sustain a subsequent promise must be such as will give rise to an implied promise, on which suit may be sustained without anything further. Upon the reasoning of the Court, then, A must have been liable to D as an original debtor, without the necessity of resorting to B's subsequent promise and the theory of a partnership by which it was to be made effectual.

A fortiori if the benefit right, or property is in one he is liable.

Principal escaped liability because agent not a partner. B, who had previously employed C at a salary, to buy and sell cattle, agreed to advance $16,500 for C to buy, keep and sell cattle, which, while kept, were put in B's brand. Expenses payable out of capital advanced, the balance, if any, belonged to B. If profits, C to share them in lieu of salary. A joined B, as partner, in suit against C on note which C gave for pasture.—Judgment reversed, because no partnership. Buzard v. First Nat. Bank of Greenville, 2 S. W. Rep'r 54 (1886).

5. *Partner acting for a firm and for himself under a common designation prima facie charges the firm.* B was managing partner for the firm X, and did business on his own account under the name of Y. B kept but one bank account, and habitually signed his check thus: 'B, agent.' A sued the members of X on a check so signed, calling them Y.—Firm name surplusage. The firm *prima facie* liable on check. Had the common designation been employed only in the business of X, the form of the check would have concluded the firm, but now X might prove Y received the proceeds. Bank v. Dakin, 24 Wend. 411, N. Y. (1840).

6. *No firm name. Partnership in farming and coopering. Presumption of firm transaction.* B C & D C were partners without a firm name. B C gave a note and signed it B C & D C. A & Co., the holders, sued and proved that he had previously given two notes signed B & D. C. Defence: The note, by its form, is an attempt to pledge his individual credit.—Recovery. Instrument presumed a firm note, and designation of the firm sufficient. McGregor v. Cleveland, 5 Wend. 475, N. Y. (1830).

7. *Partner may use his name and add Co. for co-partner.* B, C & D had entered into partnership, but had not adopted a name. B executed a note in name of B & Co. A sued the partners.—Liable. If no name, B may bind co-partners by name of B & Co. Austin v. Williams, 2 Ohio 61 (1825).

8. *Between firms.* A & Co. and B & Co. agreed to sell grain on joint account, making contracts for delivery at a future day, and dividing

profits between them. Plaintiff sued B & Co. on contract made by A & Co., in their own name, but on joint account.—Members of both firms liable: contract being on joint account, need not be in joint name. Smith v. Wright, 1 Abb. Pr 243, N. Y. (1854).

Firm liable on commercial paper given on firm account, though no firm name. B, in Rochester, and three others, in Albany, were partners. B conducted firm business at Albany in his individual name, and the others traded at Rochester in name of C, an agent. Articles provided that no commercial paper should be given. B drew on C in A's favor in firm transaction, and C accepted. Partners in Rochester were sued as acceptors.—Defendants liable, without B, whose non-joinder was not pleaded. Prohibition not binding on strangers. Bank v. Monteath, 1 Denio 402, N. Y. (1845).

Firm liable on commercial paper given on firm account, though no firm name. B, in Troy, and C & Co., in Oswego, were partners, each trading for the firm in his own city, under their respective names. C & Co. drew on B in A's favor for firm account, though on separate credit. B refused to accept, and A sued B and C & Co. as *drawers*. —Recovered, though A took draft on C & Co.'s credit. Wright v. Hooker, 10 N. Y. 51 (1854).

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§45.

The liability does not depend upon the intention to assume the obligation.

The consent of the parties makes the contract of partnership, and they agree, let it be supposed, that a partner shall not be liable. Now it is asked: How can he be bound without his consent, when consent is the groundwork of his liability? The question betrays a confusion in thought of a partner's rights with the rights of a stranger. The liability to a third person does not grow out of the parties' consent to be liable. They could never be liable to him on the contract of partnership. What has he to do with a contract between the partners to which he is a stranger? The obligation to him is independent of the partnership *inter se*, and is paramount to it. It is the performance of an act which creates a liability for the consequences, whether done by a single individual or by

several. Each one engaged in the transaction is liable for the act, as if he were the sole principal. The contract of partnership admits that the partner is a principal in the business, and his liability attaches as a matter of course, because he is a principal. The undertaking carries with it the liabilities which arise out of the business, and they cannot be shaken off. The intention of a principal to limit the extent of his liability, or not to incur any liability in the business he undertakes, is against the law, which makes a man answer for all the consequences of his acts, and denies him the power to curtail his liability. A stipulation for limited liability in the contract of partnership is like the intention cherished in the breast of a principal that he will not be liable for his agent's acts. How can the partners by their contract give away a stranger's right of redress?

A capitalist and builder joining in a building operation could not prevent the effect of the joinder which made them principals in the business, by stipulating that they were not partners. The denial of partnership is inconsistent with the position taken by them as principals. The acts of the parties speak louder than words.

Legal effect of agreement prevails against intention of the parties, even inter se. A & B bought an estate for building improvements. B furnished the capital, which carried interest at rate fixed by himself. A gave his experience and superintendence to the operation, and contributed 1-3 of his trade discounts. The financial management was in B's discretion, and his accounts could not be disputed by A. They agreed that the arrangement should be limited to the estate, improved for their mutual benefit, and should not be construed a partnership, although they shared the profits and losses equally. A brought a partner's bill for account.—B held a partner, because he had under the agreement a partner's rights and obligations, which were not taken away by the stipulation not to be a partner. Moore v. Davis, 11 Ch. D. 261 (1879).

A corporation and a patentee joined and established a foundry for the manufacture of materials to supply the corporation. The parties' disavowal of a partnership did not neutralize the effect of the joinder and pre-

vent a partnership. The result is a conclusion of law from the acts of the parties, and a partnership contract is not a public statute to repeal or abrogate the law.

The legal inference of partnership is not negatived by the parties' intention. A agreed with B, a corporation, to manufacture castings. B provided foundry, at rental of $4,000, payable out of proceeds, and supplied capital for the business. B agreed to buy all castings used by the corporation from foundry at market rates, and to use A's patent car wheels; A agreed to devote his labor and skill to the business, and to make over the exclusive right to manufacture and sell his patent wheels. The net profits were to be equally divided, and the arrangement to continue for 12 years. The net profits for the first year were $4,916, and $1,500 was reserved to pay employees. B excluded A from the management, and A obtained an injunction. B moved to dissolve, and denied A's right, by virtue of the agreement, to share in the management.—Injunction dissolved, because answer averred a dissolution by mutual agreement, and then A's remedy would be the appointment of a receiver; but B's denial of partnership did not negative A's equity, as partnership is an inference of law, and B could not deny the legal conclusion, even of the relation *inter se.* Van Kuren v. Trenton Locomotive and Machine Manufacturing Co., 2 Beas. 302, N. J. (1861).

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§46.

The law charges the principals in a joint transaction as if they had contracted with each other to perform it.

How can the relation of partnership be effected, it may be asked, without intention as the original cause and the creator of the partnership? If it results from a contract, and the parties must manifest their intention by making a contract, how can they be charged by a third person, except by proof that they have contracted to become partners in the business? But is the command imperative? Must there be a contract between co-principals, whether expressed or inferred from the facts, contemplating holding in embryo the obligation which a stranger is seeking to enforce, and will nothing short of a contract give legal expression to the liability? The law provides a remedy for the

enforcement of the obligation upon the theory of a contract, although none in fact exists.[1] A joint contract served as the type and furnished the means for proceeding as if the parties had made a contract. It is a *quasi*-contract, raised by the construction of law. For an act done on behalf of several, the law charges all concerned in the transaction, whether known or not, without reference to any agreement, or absence of agreement, upon the subject of their liability.[2]

1. "There is a class of legal rights, with their correlative legal duties, "analogous to the *obligationes quasi ex contractu* of the civil law, "which seem to lie in the region between contracts on the one hand "and torts on the other, and to call for the application of a remedy "not directly furnished either by actions *ex contractu* or actions *ex* "*delicto*. The common law supplies no action of *duty*, as it does of "assumpsit or trespass; and hence the somewhat awkward contriv-"ance of this fiction (an implied contract) to apply the remedy of "assumpsit where there is no true contract, and no promise to sup-"port it." LADD, J., Sceva v. True, 53 N. H. 632 (1873).

2. "The ground of the implied contract is the benefit drawn directly "from the use of goods or property purchased, which property has "been received immediately from the creditor in such a manner as "to create a privity of relationship between the debtor and himself; "and what is true of one, holds equally good of any number of debt-"ors." Article: "Criteria of Partnership," by S. D. DAVIES, 10 Am. Law Register, N. S. 209 (1871).

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§47.

If several withhold property, they are liable to the owner as if they had contracted to pay for it.

A liability is imposed by law upon a man who withholds personal property which does not belong to him, to pay an equivalent in value for it to the owner. The obligation becomes joint, if there are two persons who withhold the possession, and each of them is liable to the owner for the whole value of the property.[1] The act is a tort, but may become a contract by election.[2]

The owner waives the tort, and proceeds as if upon a contract.[3]

1. The liability *ex delicto* of wrong doers is thus stated by HAMMOND:

"They are liable, each by himself; since the entire damage sus-"tained was occasioned by each, each sanctioning the acts of the "others, so that by suing one alone he is not charged beyond his "just proportion. They are liable altogether, as are any number less "than the whole; because each is answerable for his companion's "act; and besides, if this were not allowed, not only would useless "litigation be incurred, the plaintiff might be reduced in his security "to one offender, since after a judgment obtained against one, he "would be precluded suing, or continuing his suits against the oth-"ers." A Practical Treatise, &c., p. 85.

Satisfaction the only bar to separate or joint suit against co-tort-feasors. B, constable, attached C's wagon under writs isued by attorney for D et al., on the theory that C's sale of it to A was fraudulent.—A recovered judgment against B, and also judgment against D et al. for the conversion. McAvoy v. Wright, 137 Mass. 206 (1884).

B, constable, attached, for C, hay as D's property. A claimed the hay, and sued C for the conversion, and recovered for part. A sued B for balance.—Cause of action, satisfied by C, released B. Westbrook v. Mize, 10 P. Rep'r 881, with note of cases, 1886, s. c. 35 Kan. 299.

2. The tort of a partner charges his co-partner only through and by means of the joint business (§24). Since a tort of this kind has been confounded with a breach of contract,[a] the damages recoverable for a tort or for a breach of contract have been assimilated,[b] and an election of either remedy follows as the result.

3. *Double proof for breach of trust against trustee-partner and against his firm, which used the trust fund.* B, trustee for A, raised £15,000, which was put in the hands of B & C, solicitors, for investment in a specified mortgage. They misapplied the money to their own use, and became bankrupt. A, by substituted trustee, proved against joint estate, and also against B's separate estate, for £15,000 and interest.—Allowed. Breach of trust a tort arising out of contract of firm. Implied contract of firm on receipt of money, and of B, who undertook trust. In re Parkers, 19 Q. B. D. 84 (1887) (§41).

Value of property, if converted, recoverable on implied contract. B sold interest in mining claim to A, who furnished machinery, tools, and means for working the claim. The undertaking turned out unproductive, and B relinquished the claim and equipment to A. Subsequently B and C ejected A, and took possession of the property. A sued them for its value.—Judgment for A reversed, because B was a partner, and could not convert his own property. Morganstern v. Thrift, 66 Cal. 577 (1885).

a. A Series of Essays on Legal Topics, by JAMES PARSONS, pp. 50–5, 1876.

b. Note to Johnson v. Stear, 109 Engl. Com. L. Rep's., N. S., 341 (1869).

§48.

A partnership as to third persons is the legal aspect of the relation at the present day.

Partnership is ordinarily classified as: 1, a partnership between the partners and, 2, a partnership as to third persons. The second class has been said not to be a true partnership, and has been termed in derogation a *quasi*-partnership. The principles of partnership were discussed primarily with reference to the partners, and only secondarily with reference to third persons. This method of treatment corresponds to the historical development of partnership, but is antiquated at the present stage of its progress. The method reverses the order of modern partnership law, which does not turn upon the rights of the partners, but upon the rights of third persons who deal with the firm. In recent times, under the freedom of contract, the partners may make any medley of partnership they please.[1] The provisions of the articles constitute a domestic law for themselves.[2] It is only when the rights of third persons are at stake that the effect of the domestic arrangement must coincide with the legal structure of the relation.[3]

1. A partner may indemnify his co-partner against loss, and give him all the profits. The agreement to indemnify a partner has been thought to lack consideration, and to be inconsistent with partnership.[a] But the contract of partnership has a consideration, and the special provisions are sustained by the general consideration.[b] The stock illustration of an impossible partnership, stated by the civilians, would not be a valid partnership, at the common law, between the partners. But the partner who assumed all the debts, and received none of the profits, might be a principal in the business

(§74), and if he had more than one co-partner, his motive might be to establish one co-partner in business. It would be a gift of his credit and services to that co-partner, and his share of the profits, increased by the gift, would be the consideration paid by the third co-partner.[c]

2. *Share in profits gives sharer no title to proceeds of goods.* By prior agreements, B, a broker, who bought for A, took 1-4 profits and 1-8 losses of adventures, in lieu of his commission. A continued to employ B, as agent, but, by a new agreement, gave him 1-3 profits and made no provision for losses. B drew, as a partner, upon the proceeds deposited by A with C, his bankers. A became bankrupt, and his assignees sued C for amount of A's deposit.—Recovered, as B had no title to the goods, or to the proceeds which represented them, but was merely entitled to a share of the profits. Smith v. Watson, 2 B. & C. 401 (1824).

NOTE.—C would be a third person, and entitled to deal with B as a partner. This would be a defence, if B had not indemnified C, and made the controversy *inter se.*

Loan, with interest, and a share in the profits does not make partnership inter se. A lent B £20 to start in business, and he agreed to pay 5 p.c. interest, and subsequently 1-8 profits in addition, by monthly instalments. A brought a petition to put B into bankruptcy. Answer: Loan usurious or creditor a partner, and account necessary.—A's right as petitioning creditor sustained. Striking monthly balance ascertains debt, and would make partner a creditor for it, although partnership continued, but as no intention to stake money in the business, or renounce right to repayment in any event, A was a lender, and not a partner with B, except as to third persons, and B "could not, after borrowing money of A, turn round upon him, and say, you are my partner by operation of law, and therefore I will not pay your debt." Ex parte Briggs, 3 Dea. & Ch. 367 (1833).

Consideration for a loan may be a share in business and profits, and yet loan recoverable as a debt from co-partner. A lent B £59 for 1-3 interest in his inventions and in the profits of manufacturing and selling them. B agreed to repay the loan in any event. A sued B for the advance. Defence: A was a partner.—Recovered. Although the consideration for the loan was a share of inventions and profits, the contract to repay at all events prevented the loan from becoming partnership funds. Elgie v. Webster, 5 M. & W. 518 (1839).

Holding out does not make a partner in interest. A sued B for price of merchandise. He pleaded non-joinder of C. A called C as a witness, who, on his *voir dire*, testified that business was carried on in name of A & C, and that he accepted drafts for firm, but had no share in the business as a partner.—Competent, for not a partner in interest, though he held himself out as a partner. Parsons v. Crosby, 5 Esp. 199 (1805).

3. *Sharing profits for loan of credit and trouble, no partnership inter se.* B, not having sufficient credit, induced A to buy goods with him for an adventure, and agreed to give him half the profits. The sale was made to both, and A, who had been compelled to pay the price, sued B's executor to recover it.—Recovered. Though a partnership as to third persons, none *inter se*, because profits merely compensation to A for his trouble and credit. Hesketh v. Blanchard, 4 East. 144 (1803).

a. Dictum: partner's indemnity of co-partner nudum pactum. A advanced the capital. B furnished the skill and did the work. Profits divided equally. B indemnified A, and gave collateral. Loss beyond collateral. A claimed reimbursement in account. Arbitrators ignored guaranty.—Award conclusive; but guaranty *nudum pactum*, and A charged with 1-2 the loss. Brophy v. Holmes, 2 Molloy, Ir., Ch. 1 (1828).

b. Partner may indemnify co-partner against loss. A, author, and B, publisher, agreed that profits of every edition should be divided equally, after deducting 10 p. c. for commissions and as indemnity against bad debts. B assumed the risk. A brought bill to rescind, averring an agency. B claimed an irrevocable license.—Decree for dissolution. A partnership, though B stood the whole loss. Reade v. Bentley, 4 Kay & J. 657 (1858).

A partner, though salaried and indemnified by a pledge of the profits, should be joined as co-plaintiff. A & B were in partnership as solicitors. By the articles, B stipulated against any liability for losses, and had a lien on the profits, to indemnify him if charged with any losses, and bargained for £300 a year out of the profits, a sum equal to 1-5 the then profits. A & B sued a client for services. Plea: B not entitled to recover as plaintiff.—B rightly joined. The fee belonged to both until the accounts were settled and the sum divided. The fact that B was indemnified did not take away his right to the fund which was pledged for his security. Bond v. Pittard, 3 M. & W. 357 (1838).

Partner need not share loss. A & B, upon dissolution, submit accounts to arbitration. Award: A to receive no compensation for services, nor pay for any losses during the years when no profits made. A sued to enforce award.—Judgment. Partners competent to agree that one should bear losses, and presumption that award based on such agreement. Cochran v. Bartle, 3 S. W. Rep'r 854 (1887).

c. Managing firm business but an indication of membership. B furnished D & C, partners, brewery, machinery and capital to carry on the business, stipulating for $700 a year for the use of his property. He bought and sold for the firm, and paid the debts from the proceeds of the business. A sued B, as partner in the firm of D & C, for the price of goods. Defence: No partnership, but B's agency and loan a benevolence to D & C, his relatives B informed A of this at the time of purchase. Court below rejected evidence of motive.—Reversed. Evidence competent for jury. Agency but an indication of B's membership, and rebutted by proof of a motive consistent with the acts. Tracy v. McManus, 58 N. Y. 257 (1874).

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§49.

It is the business which invests the partners with commercial prerogatives, and, unless engaged in a business, the principals in a joint transaction, although liable for the act, have no partnership powers.[1]

A joint purchase makes the purchasers principals, and each liable for the whole price. The contribution charges the solvent buyers for the insolvent's quota of the price.[2] Why are not the buyers partners in the purchase? They join as principals in the transaction. The answer is: The Common law does not admit a partnership in buying.[3] As trade consists of buying and selling (§7); the transaction does not come within the province of commerce, and is not governed by the Law Merchant (§4). The joint purchase is left to be interpreted by the tradition of tenures, and holding property in common does not convert the possessors into partners.[4] The purchase is presumed to be for division or for holding in common.

The purchase must be joint, or the point does not present itself. The purchase by several may be joint in form, but separate in interest. The effect is a separate purchase by each.[5] If the purchase is by one for several, he could not charge each principal for more than his quota. The agency was limited to buying a specific amount without any joint purchase by all.[6]

1. Twenty-three underwriters, who had insured a ship, which was abandoned by the owner, took the vessel, each settling for his proportion of the risk with the owner. They sold the ship to divide the loss. A joint sale was not the purpose the insurers had in view when they took the vessel, but that was merely an incident. They were compelled to buy the ship, not as an article of traffic, to make a profit by selling it, but to get rid of it and divide the loss.[a]

A joint purchaser, bound to pay the whole price, could not acknowledge it by accepting for his co-purchaser the seller's draft, though acceptance is less than payment. B & C bought land of D, who, to pay off A's lien, drew upon them for price in A's favor. B accepted. A sued on draft. Defence: Failure of consideration as D no title.—Judgment for A reversed, because, at best, not being holder for value

on account of a debt past due, he took subject to acceptor's defence against drawer. Schaeffer v. Fowler, 1 Am. 451, Pa. (1886).

2. A joint purchase charges each buyer for the whole price. The contribution among the buyers is an adjustment made by equity of the consideration in proportion to their interests.

Joint adventure a partnership, and, though quotas specific, liability in addition for insolvent party's quota. A, and four other firms, agreed to take 1-5 interest each in 1200 tons of sugar ordered by B. As bills would be drawn on B, he should have power of sale, though each party undertook to pay his quota of drafts, and assumed 1-5 of the risk. Adventure resulted in a loss, and two firms failed. A, who paid the bills, sued the two solvent firms for contribution. Defence: Each liable for only 1-5 of loss.—Contribution enforced against each for 1-3, because a joint venture of the five, which rendered solvent parties liable for quotas of insolvent parties. McInroy v. Hargrove, 16 L. T. 509 (1867).

3. The books speak of a partnership in buying, and a joint purchase would naturally make the purchasers partners, as they are co-principals in the transaction; but the feudal tradition of holding property yielded as little as possible to the commercial principle, which makes it an article of traffic. The transaction not being within the technical definition of trade, was excluded from the operation of its laws.

4. *Purchase of interest no partnership if division intended.* A bought 1-6 interest in cotton owned by B et al., en route for N. Y., to be divided or sold on arrival. None was ever sold, though part was divided. B sent the rest to his N. J. factory. A sued for conversion. Defence: Partnership.—Recovered. Agreement alternative; partial division of cotton a determination against a partnership. Ward v. Garnet, 6 Duer 257 (1857).

5. Gibson v. Lupton, 9 Bing. 297 (1832) §7, n. 1.

6. Hoare v. Dawes, 1 Douglas, 371 (1780) §7, n. 3.
Coope v. Eyre, 1 H. Bl. 39 (1788) §7, n. 1.

a. Joint owners. A insured cargo; and B & C, with 22 others, as separate underwriters, insured ship. Ship captured by enemy, and abandoned by owners to underwriters, who paid as for total loss. Captain ransomed ship with portion of cargo, and, out of proceeds of residue, sold at port of destination, repaired ship. A, paying insurance on cargo, was subrogated to owners' title. He sought to charge B & C, as partners, for amount expended in repairs.—Liable only for quotas as co-owners. Not partners, though they designed to sell ship, because not voluntary purchasers, but owners by necessity. United Ins. Co, v. Scott, 1 Johns. 106. N. Y. (1806).

§50.

Though the existence of a partnership *inter se* is determined by the intention of the parties, its effect is to make them principals.

Where there is a contract, what the parties intended is ascertained by the ordinary rules of construction. What is the real nature of the undertaking? This is the fact to be established. Does the undertaking provide for a transaction, or a series of transactions, in reality, on behalf of all?[1] If a partnership is intended by the parties, no disguise of the operations under any other relation will prevent the law from attaching to the members all the incidents of partnership, and the chief incident is liability as a principal. The law does not determine who are partners *inter se*. The parties create their own relations. The law simply imposes upon the parties an adherence to the positions which they have taken, not in semblance, but in fact (§44. n. 1, and §45), and charges them as principals.[2]

The controversies about the existence of partnership arise from inattention to the prohibition by law of piecemeal partnership, except so far as it is limited to the partners themselves. The relation is a well-known association with definite traits and results. The freedom of contract does not permit the parties to remodel the structure of the partnership relation, except for themselves. They are powerless to alter its constituents as to strangers; and when they do come into conflict with third persons, they are compelled to accept or reject the status of partners as an aggregate. The confusion arises from the mistaken belief of the parties, who think they have the right to

contract for any portion of a partner's attributes, without being bound to assume the rest of them, if they are expressly excluded by the contract. The only difficulty for the courts is to decide whether the part contracted for is sufficient, or not, to carry the whole.[1]

1. The attribute which distinguishes a partner from all who are not partners is undertaking a business and being a co-proprietor of it. The business, if not carried on by each partner, is, at least, carried on for him. It is his right to have the business conducted as he planned and started it, although he should take no part in its control or management. The fact that the business is carried on by his will, and for his benefit, shows that he is a principal. Being a proprietor, it is immaterial whether he participated in the management or not, as, for example, a dormant partner.[a] Although, in his case, the impulse was imparted at the outset, the original force continues and sustains the business. When withdrawn by the demand for an account, which involves a settlement of the business, the partnership comes to an end. The power which created and can terminate the relation perpetuates it by permitting it to stand.

2. *Sharing profits, with absolute control of business, makes a partner.* B, owner of a mill, agreed with A to manufacture cotton. B was allowed £300 for rent, and 5 p. c. for the capital, which was all advanced by him. A had entire control and management of the business, and received £150 a year and 1-5 profits. The book-keeper rendered account to both, and A agreed to engage in no other trade. B expelled A, who sued to be reinstated as a partner.—Reinstated. A's absolute control of the business, and his direct sharing the profits, showed the parties' intention, that he should be a partner. Greenham v. Grey, 4 Ir. C. L. 501 (1855).

3. *A loan, if a cover for a contribution, charges the lender as a partner.* B & C agreed to raise for a business, by contributions 2-3, and by loans 1-3, of the capital, which was divided into 60 shares, the loans to be made under 28 & 29 Vict. c. 86. A loan admitted the lender to the rights of a contributor, and entitled him to share the profits in proportion to his share in the capital. He could compel B & C to conduct the business according to the deed, to exhibit periodical accounts, and permit him to inspect the books. If he became bankrupt, they were to pay him off, and to refund his loan at termination of the partnership, unless on a settlement his share of losses equalled the loan, though he was not liable beyond it. B & C failed, and A, the holder of a draft, sued D, who took shares by way of a loan, as a partner.—Liable, as a dormant partner. The lending a pretence to conceal partnership. Pooley v. Driver, 5 Ch. D. 458 (1876).

Sharing profits indefinitely, and also losses until 1-2 advances lost, and option to reclaim balance exerted, make a partner. A, by 28 & 29 Vict. c. 86, put £10,000 in a firm, under articles which stipulated that B & C should be partners for three years, a period subsequently renewed; but that A should not be a partner. The £10,000, with such advances as any party should make, constituted the capital, which carried 5 p. c. interest. A took 1-4 the profits and losses, the balance was divided between B & C. Periodical accounts were exhibited to A, who had option, if his £10,000 was reduced 1-2 by losses, or if either partner died, to dissolve partnership and become liquidating partner, or let surviving partner continue the business and divide deceased partner's share with A, though, if he died, his executors were not to withdraw capital until expiration of term. He had right to sell out, and B & C the right to pay him off. They failed, and A offered to prove for £6,000, subsequently advanced by him, and interest.—Rejected, because A was a dormant partner. He shared profits indefinitely, though his right to withdraw capital when reduced to a moiety by losses, made him share them only to a limited extent. He had control over destination of his capital. B & C were not his debtors, and he could reclaim but a portion of his advance. Ex parte Delhasse, 7 Ch. D. 511 (1878).

Advance, coupled with partnership privileges, makes lender a partner. B advanced C, for his contemplated business, £500, stipulating, 1, that C should repay the loan within 48 hours after demand, and, 2, until payment, 5 p. c. interest and, 3, in addition to interest, a sum equal to 1-2 the net profits of the business, less a salary of £4 a week for C's management; 4, that C should devote his whole time to the business until repayment; 5, that he should keep books of account open to B's inspection; 6, that a half yearly account and valuation should be made by C, at his expense, for B, and, 7, that C should furnish B every facility to verify the account. A sued B as a partner.—Liable. Act 28 & 29 Vict. c. 86, s. 1, enables lender to take a share of profits without on that account alone being held a partner. But the sharing is not excluded as a constituent when combined with other stipulations. Clauses 1, 2 and 7 indicated a loan; 3 and 4 a partnership, and 5 and 6 either a loan or a partnership. Froude v. Williams, 56 Law Times Rep., N. S. 441 (1887). Comment, 83 Law Times 92–3.

Nor do the French permit any disguise of a partnership.

A loan with a partner's rights makes lender a partner. A, prevented by his office of sheriff from engaging in commercial business, lent 3.300 francs to B, to develope a quarry. An equal amount was contributed by B, and also by C. If the partnership continued ten years, A could take 1-3 the capital, in the interval he shared the profits in lieu of interest equally with B & C, had the right to inspect the books, advise and vote on partnership questions, prevent liquidation or dissolution, and, upon its happening, he had 1-3 of assets on account of his loan. A took part in managing the business, and dealt with others as partner.—In the liquidation, A must be treated as a partner. Like his co-partners, he must bear the losses as he shared the profits, in proportion to his loan, which was a contribution. Sociéte de l'Isère, 5 Revue des Sociétés 266. 1887.

a. *Plaintiff may sue dormant, on contract with ostensible, partner.* B, timber broker, suggested to C the purchase of a cargo of timber from A. The invoice was made out to C, and B drew on him for the

freight, which C paid. A sued B & C, as partners, for the price. Some evidence of joint shipment. Objection: Contract by C.—Plaintiff might show B was interested in the contract, as a dormant partner. Ruppell v. Roberts, 4 N. & M. 31 (1834).

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§51.

Property is the medium of partnership, and partners are proprietors of the stock.

As trade consists of buying and selling, its subject-matter is merchandise. Without property there could be no trade. Property, as the medium for partnership acts, and the substance of its transactions, is the *trait d'union* of partners.

A principal in the business means a proprietor of the stock; one who, by virtue of his dominion, buys and sells the property of the firm.[1] If he is invested with the prerogative of dominion, although he has, in fact, no title to the property, he is none the less assumed to be a proprietor by those who deal with the firm (§4, §25).[2] The domestic arrangement between the partners does not affect the position which is created by the nature of trade.

Sharing the profits and losses of a business, if not by co-owners, forms a distinct class of association in the Civil law, called *association en participation*, and is contrasted with partnership, which is a sharing by co-proprietors.[a] By the Common law, the sharing of profit and loss by proprietors identifies them with the business, and, being jointly interested in the business, they are partners. The Civil law does not judge the party by his interest in a transaction, but charges him only upon his avowed contract.[b] The undisclosed principal not being liable under

that system when discovered, the cases in which he escapes liability are grouped under the *association en participation.*[c]

1. *If profits shared as proprietors, joint action lies.* A & C shared profits of purchase and shipment of cotton. A sued both.—Charge sustained, that parties' intention was not controlling, but a joint interest would give a joint cause of action. Stevens v. Gainesville Nat. Bank, 62 Texas 499 (1884).

Buying land for capitalist with half profits of sale, a partnership. By oral agreement, A was to furnish money, with which B was to buy land, taking title in A's name. A received for his capital 10 p. c. interest and half profits from sale of land. A brought account against B.—Account lay. A & B partners. Richards v. Grinnell, 63 Iowa 44 (1884).

Buying land on joint account of capitalist and prospector, a partnership. B received money of A, to be invested on joint account in buying land; if no investment made, to be returned. Administrator of A sued B.—Verdict for plaintiff set aside. B not a trustee or agent, but partner of A. Hill v. Sheibley, 68 Ga. 556 (1882).

Proprietors sharing profits are partners. A undertood to look up and bid for desirable lands at tax sales, to procure deeds from the State, and to put title in B; who agreed to furnish money for the purchases, and to hold title for both. They were to sell the land and, after repaying B his advances, share the proceeds. A brought account; B demurred.—Decree. Joint owners of land, each exerting the powers of proprietors and sharing the profits of aggregate transactions. Hunt v. Erikson, 57 Mich. 330 (1885).

Sharing profits and losses by co-owners, at least in part, makes joint business. B gave C the use of $4,000 for 1-4 interest in a patent, to be repaid solely out of first profits, without recourse to C. C, the sole and salaried manager, was entitled to retain 1-2 of B's profits until they amounted to $15,000. They agreed not to be partners, but co-owners. C rented a store, and signed the lease as president of the "C" Co. A sued B & C on the lease for balance of rent.—Recovered. Sharing in profits, with a limited share in losses, makes a business carried on for joint benefit. Manhattan Brass and Mfg. Co v. Sears, 45 N. Y. 797 (1871), reversing 1 Sweeney 426.

Cultivating peach trees, and sharing the profits of crops, no partnership. B furnished 2,700 trees. C planted and cultivated them on his farm. He agreed to pick and market the fruit during the life of trees, at joint expense, and account to B for 1-2 net profits. B died, and his administrators sold his interest to A, who demanded specific performance and an account of 1-2 profits. Defence: C surviving partner, and A no standing.—Contract enforced, because no partnership without joint ownership of funds. Transaction a sale of trees, and the price 1-2 profits of the fruits. Robbins v. McKnight, 1 Hal. Ch. 645, E. & A., N. J. (1847).

2. *The control as if owner and sharing profits.* A owned saw-mill and timber; B conducted business, receiving 1-3 profits. B paid individual debt with timber from mill. A sued creditor in assumpsit. He objected non-joinder of B.—Non-suit, because the control, with services and share in profits, made partnership. Dob v. Halsey, 16 Johns. 34, N. Y. (1819).

Temporary proprietorship sufficient for partnership. B, owner, executed deed in escrow to C, D et al., for half interest in a mine, to be delivered on payment of price within 90 days. E, manager, bought tools and supplies for working the mine, and sued C, D et al. for price.

Defence of C & D: Attorneys employed to secure property and interest given for services.—Recovered. Partners in working mine, though not proprietors. Manville v. Parks, 7 Col. 128 (1883).

Dealing with the title for the purpose of gain shows a partnership *inter se* when the nature of the business excludes the partners from any beneficial interest in the property itself.

Exerting the function of proprietors and sharing the profits make partners in a single venture. If partners brokers for sale, and sale becomes impossible, a partner may buy for himself. B, having an option to sell 4-5 of a mine, and A, the agent for sale of 1-5, agreed, in case they effected a sale of the lode, to divide the expenses and share the profits between them. The option was extended to December 10, by putting up a forfeit of $1,500. C, the only prospective purchaser, had forfeited $2,500 to A & B by his failure to purchase within a limited time. At the last moment before the option expired, but after the negotiation with C had failed, B, without A's knowledge, advanced the price, $17.000 for 4-5 and $3,000 for 1-5, and took title himself. The forfeit of $1,500 reduced the cash paid for 4-5 to $15,500. A promised B $1,500 out of his profits, and induced B to give C five days additional time, but C failed to purchase. Question whether advance of $1,000 by B to owner, when extension obtained, was out of the $2,500 firm assets or out of his separate property. A brought bill for 1-2 interest of mine and its product.—Bill retained for account of assets or A's share of $2,500 less $1,500, that is $1,000 less expenses. Partnership to effect sale of property belonging to others, without any interest in the title. B, in buying, did not represent the partnership, for it could not outlast its object, which had ceased to exist. The $1,500 was saved to firm by B's purchase and the extension of time for C renewed the business. At best, the $1,000 was used, not to sell, but to buy, the title, a purpose foreign to the partnership. Kayser v. Maugham, 8 Col. 232 (1885).

a. "Cassaregis, dont l'opinion est si puissante en droit commercial, fait "aussi une différence sensible entre la participation et la société: les "participans ne lui appraissent par comme de vrais associés. Et pour-"qoi? par le motif donné par Deluca: parce que les participans ne "sont pas coseigneurs de l'affaire: '*Non sunt socii, neque in jure* "*formali, negotii considerantur condomini; sed solum sunt partici-*"*pes.*' *De la cette conclusion: 'Maxima est differentia inter socium* "*et participem, et sic diversi in jure producuntur effectus, quorum* "*praecipui sunt, ut participes non teneantur nisi ad ratam capitalis* "*pro quo participant in negotio; neque ipsi agere possunt contra* "*debitores societatis, neque conveniri valent a creditoribus societatis.*'" TROPLONG, des Sociétes, §494.

b. "Ne peut constituer qu'une association en participation, et non "une société en nom collectif qui serait nulle pour défaut de publica-"tion, la mise en commun d'opérations commerciales, quel qu'en soit "l'objet, entre divers commercants, si chacun des interessés agit en "son nom seul, sans révéler aux tiers avec lesquels il traite qu'il "représente d'autres intérêts que les siens propres." ROUSSEAU, Sociétés commerciales, §1736.

"D'abord elle est occulte, essentiellement occulte, Quel que soit "son objet, si elle se manifeste au public, elle n'est pas une partici-"pation. * * dès l'instant qu'elle ne reste pas concentrée dans des "rapports intérieurs, elle est une société collective; le nom de par-

"ticipation est menteur, il ne lui appartient pas." TROPLONG, des "sociétés, §499.

"Il fut enfin reconnu que le caractère essentiel et dominant de la "participation était d'être occulte, de ne point se manifester aux "tiers, de se résumer dans un compte de bénéfices ou pertes entre "les associes." VAVASSEUR, des Sociétés, §315.

c. "*Première combinaison.* Un navire arrive d'Amérique à Bordeaux, "chargé de marchandises. Un négociant de ce port envoie à son cor- "respondant de Bayonne le détail de la cargaison et lui propose "d'acheter avec lui une partie de café, qui, suivant toutes les appar- "ences de la place, pourra être revendue avec de grands avantages, le "priant de lui faire connaître, en cas d'affirmative, pour quelle part il "désire entrer dans cette spéculation. Le négociant de Bayonne "répond qu'il accepte l'affaire pour un tiers, et qu'il entrera dans cette "proportion dans les profits et pertes. Là-dessus, le négociant de "Bordeaux achète la marchandise en son nom, et par-là se forme une "association en participation, que l'on appelle aussi *compte en partici- "pation*, parce qu'elle se résout en un compte entre les deux négocians. "Dans cette position, il est clair que le négociant bordelais, qui aura "acheté du maître du navire la partie de café, sera seul obligé envers "lui; le negociant de Bayonne, au contraire, n'aura contracté aucune "obligation; et si le Bordelais vient à faire faillite, le vendeur n'aura "pas de recours contra son participant. *Deuxième combinaison.* Je "me suis rendu adjudicataire de la ferme de l'octroi d'une grande "ville; mais, pour me procurer des resources dont j'ai besoin, j'ad- "mets plusieurs capitalistes à participer, avec moi, aux profits et "pertes, moyennant qu'ils me fournissent des fonds jusqu' a une cer- "taine somme convenue. Du reste, cette participation doit demeurer "inconnue; je suis seul obligé comme fermier de la ville; tous les "actes se font en mon nom. *Cinquième combinaison.* On trouve en- "fin la simple participation dans l'espèce suivante. Deux ou trois "marchands, voyant que le blé est cher en France et bon marché à "Odessa, conviennent que Pierre, l'un d'eux, ira dans cette ville pour "faire un achat considérable de tant de sacs de froment, et pour en- "voyer ensuite ces grains dans le port de Marseille à Joseph, autre "participant, chargé d'en faire la revente. Du reste, comme il ne "s'agit que d'une seule affaire déterminée, ces marchands ne pren- "nent pas de raison sociale. Un seul achète ce qui est convenu; un "autre revend seul, et rend compte à ses associés, anonymes pour le "public. Ces deniers ne sont pas engagés envers les vendeurs des "fromens; ils n'ont pas agi collectivement. Celui-là seul qui a paru "a contracté des obligations; les tiers ne connaissent pas les autres "et ne peuvent de leur chef les rechercher." TROPLONG, des Sociétes, §482–3, §485, §488. The French cases are collected by ROUSSEU, des Societés, ch. XII. "Le participant qui agit n'est pas nécessairement, "comme dans la société collective, le mandataire de celui qui n'agit "pas. Presque toujours l'affaire est sienne; il opère en droit soi, "comme dit Savary, et alors on ne peut le révoquer; car ce serait "vouloir lui enlever le domaine de sa chose. Le fermier de l'octroi "qui a des participans, le négociant de Bordeux qui achète une portion "de café de compte à demi avec le négociant de Bayonne, le marchand "qui va acheter du blé à Odessa, tous font leur affaire propre: s'ils ont "des associés, cest pour partager les gains et les pertes, mais pas pour "communiquer la propriété même de l'operation. Cependant, il peut "aussi arriver que le participant actif soit le mandataire de l'autre "pour conduire à fin l'affaire dont les résultats doivent être partagés. "Si Pierre, qui va partir pour le Levant sur le navire l'Ajax, est

"chargé par Paul d'opérer à Smyrne, de compte à demi, la vente de "certaines marchandises qu'il lui confie, Pierre joue, dans cette "société en participation, le role de mandataire de Paul." TROPLONG, des Sociétés, §503-4.

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§52.

Sharing the profits by the proprietors of the stock connects the share-takers as principals, through the medium of property.

The phrase, sharing profits 'as profits,' attempts to say that the title to a share of the profits depends upon a corresponding ownership of the firm stock. As property is at the owner's risk, a loss of it falls upon him. Dividing the loss is the counterpart of sharing the profits. He takes the benefit, and he bears the burden of ownership. To a dealing with property, as a means of gain, correspond the liabilities incurred in the business. If profits are treated as the increase of property made by trading with it, the share-taker would be considered a proprietor, and suffer any loss caused by the transactions as a decrease of his property. It was upon the property-theory that sharing the profits was conclusive of a partnership.

Proprietors. buying and selling stock, partners A & B agreed to buy eggs with money contributed by each, store them with B, and each sell and share the profit and loss. A, who performed his part of the contract, sued B for neglect in taking care of eggs. Demurrer. —Action lay, though partners. Bohrer v. Drake, 33 Minn. 408 (1881).

Interest of proprietors in the business and its profits makes partnership. B agreed to lend C & D $5,000 from time to time, according to requirements of their business, manufacturing and selling segars, and let loan remain, as a permanent fund in the business, from one to five years, at his option; C & D to devote all their time and skill to the business, which should be confined to manufacturing and selling segars; to keep account of all purchases and sales, and from and to whom, and when, made; and of all receipts and payments, and to pay, every six months, 3-5 profits, with a guarantee of at least $3,000 a year to B, who should have a lien on all firm property, as security. Breach

of contract by C & D put an end to loan, and authorized B to take possession of assets, and sell them to satisfy his loan. A sued B on notes made by C & D in the business.—Recovered. No repayment of loan, no rate of interest. C & D not sole proprietors. Guarantee for B's benefit. Rosenfield v. Haight, 53 Wisconsin 260 (1881).

Sharing profits as proprietors is partnership. B, owner of plantation, owed C $1,000. They agreed to raise a crop, B furnishing outfit and land, and advancing money to pay hands and carry on business; C hiring hands, superintending business, and reimbursing B half his outlay of $1,000. B mortgaged crop to A, and C sold bales of cotton in dispute to D.—Judgment for D reversed. Partnership, because, as proprietors, they looked only to profits. Reynolds v. Pool, 84 N. C. 37 (1881). Affirmed in mining partnership. Mauney v. Coit, 86 N. C. 463 (1882).

B & C agreed to raise and dismantle sunken steamer, B furnishing machinery, C funds and labor. The material recovered to be sold by B on joint account, advances made by C being first repaid. A supplied articles to C, and sued both.—Recovered. Partners. Lynch v. Thompson, 61 Miss. 354 (1883).

A, B, C, D & E agreed to cut and sell ice, deduct expenses, including their labor, from proceeds, and divide the residue in equal shares. E, with concurrence of C and D, sold ice to F. A and B, being dissatisfied with price, demanded account of C, D and E for 2-5 full price, and made F co-defendant.—Bill dismissed as to F. Decree against C, D and E for actual price. Partners. Each has *jus disponendi*, and majority controls. Staples v. Sprague, 75 Me. 458 (1883).

If broker joins in purchase on his own account, and takes an interest instead of a commission, he is a partner. A, a merchant in London, directed B, a broker at Liverpool, to buy cotton, and allowed him 1-3 interest in profit and loss of adventure, instead of a commission. The transaction, which lasted three months, was treated in the correspondence as a joint purchase, and the cotton was stored in building rented by B. B pledged the cotton to D, who thought B was the owner.—A brought trover for 2-3 the cotton. D entitled to it, as B was a partner, and had the right to pledge. Reed v. Hollingshead, 8 B. & C. 878 (1825).

Sharing partnership fund and a sum out of profits, make a partner. B advanced £24,000 to C & D, who were in partnership, as brewers, and the three executed a deed, by which a partnership stock was created, as their joint property. B had no aliquot share of the profits, but the right to an account, in order to get £2,000 or £2,400 out of the profits. C & D became bankrupt, and A sued B, as a partner.—Liable, because a joint owner of the partnership stock, and entitled to a sum out of the profits, though not to an aliquot share. Ex parte Chuck, 8 Bing. 469 (1832).

Proprietary interest in profits, coupled with an advance, makes a partnership. B lent C & Co. $2,000, and took 1-3 of profits in lieu of interest, stipulating for semi-annual settlements, and an option to become, by an additional payment, a partner at end of the year. A sued B as partner. Defence: Share in profits compensation for loan. —Profits not compensation if partaker also makes advance to firm, but coupled together stamp the title to profits as proprietary, and the advance as a contribution. Leggett v. Hyde, 58 N. Y. 272 (1874).

Joint ownership of subject-matter, with control and share in profits, make a partner. B procured, for C & D, a contract for building a railroad, and agreed to give his skill in constructing it. They agreed to give him 1-3 net profits made out of the contract, and 1-3 net profits of operating the road. B assigned his interest under the contract to

E & F, for $20,000. C & D agreed, in consideration that E & F would raise funds for the enterprise, to deduct the $20,000 out of the $300,000, and share the profits of the contract equally. The business was carried on in the name of C & D. A, a track-layer, sued the four on a note given him by C & D. E made defence: Not a partner.—Liable. He had a joint interest in working the contract. Voorhees v. Jones, 5 Dutch. 270 (1865).

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§53.

The title to profits depends upon ownership, not upon partnership.

The right is created by the law of property, not by the law of relation, and property includes, not only the tangible stock, but the capitalized services of the partners. The profits are an incident of dominion, as rent is an incident of proprietorship in land. They are the result, or consequence, of business, a product of the partnership. The partners share the profits, because, upon a dissolution of the firm, the members inherit its property. A division of the firm property, whether it consists of profits or of stock, puts an end to the firm. As to that property, the partnership is dissolved. A partnership in a single transaction discloses the process. At the instant the partner's right to share the profits accrues, the partnership ceases to exist. In every partnership the right to share the profits of the firm, or its stock, can be enforced only by a final account, which means a dissolution. The right to share in the profits is an individual or several right, which takes effect after the joint right is dissolved into its constituent parts. Partnership brings its members into combination, and makes them a unit. The rights of the partners are so exclusive that the

exertion of a several right dissolves the relation. The co-called right to share the profits during the partnership is not a right at all, but a threat. It takes effect as a condition, reserved at the outset, to sever the relation altogether, unless a partial dissolution is conceded for the occasion. The joint right of ownership is inconsistent with several rights of ownership in the same property, and cannot co-exist with them. The individual title, if permitted for convenience, to exclude the joint proprietorship of the firm, is not recognized, except as an indulgence. The sanction which gives legal validity to the right makes a dissolution of the partnership the only means of enforcement. The right of the partner, therefore, is to dissolve the firm, in order to get his share of the profits.

The co-incidence of profits is not with partnership, but with trade. They belong to trade, and they disclose their identity with it. As the desire for profits is the motive which creates the business, they are the cause of trade, because they are the product of its transactions. The profits became a constituent of partnership, on account of the field of its operations being limited to trade. It is the business which is concerned with profits, and the profits make the trader. The partner is a trader,[1] and as trade is buying and selling property, he is a proprietor.

The partners have a joint title to both contribution and assets. The separate titles do not come into existence until the joint title is exhausted. The partners, as debtors, do not obtain a clear title until their creditors are paid. Nor can they compete, by means of their separate titles, with the firm-creditors, who are also subrogated to their separate rights. The credit-

ors rely upon both the joint and separate titles of their debtors for satisfaction. The profits, when shared, are separate estate, but the partner cannot take or hold them against the creditors, to whom he pledged his title. He renounced his separate title in advance, and postponed his right of property in favor of the creditors until they were satisfied. This is the pledge of partnership.

1. *Salary.* A took 1-4 profits in lieu of salary. Plaintiff joined him as partner.—Not partner, because not a principal trader in the business. Dissent.—Sharing profits in lieu of salary makes partnership as to third persons. A, not being principal, could not join as plaintiff; such right depends on existence of partnership *inter se.* But he may be made defendant as partner *quoad alios.* Burckle v. Eckhart, 3 Comst. 132; s. c. 1 Denio 337 (1849).

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§54.

Partners, being nothing but co-proprietors in business, proving the indicia of ownership, charges a principal who could not otherwise be identified as a partner.

It is in this way that sharing the profits established the title of a proprietor, and hence a partnership.[1] It makes no difference what distribution the partners have made of the contributions among themselves. A partner who is excluded from all participation in the stock will be none the less a co-owner of it for the purposes of the business. As to third persons, the contributions belong to the firm, and the title is vested in all the partners.

The suggestion might be thrown out that others besides partners, upon the same principle, contribute to the firm stock, and would be entitled to share the

profits as proprietors. If the services of a partner can be discounted in advance and turned into money at their ultimate worth, the process is available for the services of anybody else. The agent, manager, superintendent, clerk or servant might commute his services into gold with equal facility, and claim the profits as a co-proprietor of the stock employed in the business. The answer to the suggestion is, that capitalizing services against a contribution is a question of intention. If they are accepted as a contribution, they invest the person who renders them with the title and prerogatives of a proprietor.

The position of a proprietor is contrasted with that of a creditor. The partner renounces all profits until the creditors are paid. If he takes profits, he proclaims his position as a partner, for they are what remain after all claims are paid. A creditor is not entitled to the profits, and if he claims a part of the profits, the demand is inconsistent with his position as a creditor. The proprietor alone is entitled to the profits. The primary effect of taking profits is to exclude all who are paid out of the capital or its product, and this leaves only the partners, who are entitled to the profits. It would be an anomaly to break the connection between the proprietor and his profits. Yet, apparently, this is done whenever a creditor is permitted to take a portion of the profits without altering his relation. It is the existence of this apparent exception which has produced such confusion and puzzled the profession.[2] It would be an exceptional freak of the law to invest a creditor with the proprietor's right of dominion without changing his status as a

creditor. No wonder such a mongrel notion could not be brought into consistency with principle.

The right to take the profits revealed a proprietor. No one else could touch them, except by his permission. If any other person did claim them, he would be compelled to make out his claim from and through the proprietor. There is but one mode in which this could be done: The creditor must exert his right in the name, or by the authority, of the proprietor. The creditor is the appointee of the proprietor, and exerts a delegated right. The power is undoubtedly coupled with an interest, and cannot be revoked, but it is still nothing but a delegation of authority. By law, the profits belong to the proprietor, and he, by virtue of his dominion, empowers the creditor to take them. This explains the profit-sharing theory, and makes it intelligible. It explains, also, the creditor's profit-sharing, and makes it consistent with the theory of partnership.

The exception, which, however, has been shown to be only apparent, was sufficient to prevent the inference of a partnership from being conclusive, and led to a rejection of the profit-sharing as a test of partnership. The question turned upon the capacity in which the recipient took the profits. But the capacity is involved in the profits, and cannot be severed from them. The failure to observe this connection has led to the exclusion of profits as an element in determining the capacity of the recipient, and made the ascertainment of the capacity simply a question of fact, independent of the property element. It is denied that the element of property enters into the partnership relation. The law of property is excluded and treated as foreign to

the relation. The property involved in a partnership is regarded as an extraneous fact, without any connection in law with the partnership. The profits, in this aspect, have nothing to do with the law of partnership, and the effect of sharing them does not raise a question of law for the court, but, if any, a question of fact for the jury.[3] As an extraneous fact, taking profits is no more evidence that the recipient is a partner than that he is a creditor. The profits may belong to a creditor, with as much right as to a partner.[4] This is the conclusion which results from excluding the property element from the law of partnership, and from trying to construct the principles of partnership out of nothing but the abstract doctrines of principal and agent.

Taking profits, therefore, is not an indifferent fact, which fails to indicate whether the taker is a partner or a creditor; on the contrary, it reveals a proprietor. The creditor himself can take them only in right of the proprietor. Therefore, it is not until the creditor has proved his right to them, by the appointment from the proprietor, that he is permitted to disavow his title as a proprietor. The law of property makes him a partner, unless he can prove that he takes by the authority of another, who is the proprietor. This is the principle which underlies the proposition that sharing the profits is *prima facie* evidence of partnership. The profits, as a matter of evidence, apart from the element of property, would prove nothing either way.

1. *Undisclosed principal in a joint venture a dormant partner.* B bought coffee on a joint venture with C, who paid his part of the price. B had the management of the transaction, and deposited the coffee with A, who debited B with the advances upon it, and did not

know of C's interest in the venture. The coffee was sold at a loss, and a commission in bankruptcy issued against B; and another against C. A proved for his balance against B, and offered to prove against C.—Entitled, because C a dormant partner and undisclosed principal. Ex parte Gellar, 1 Rose 297 (1812).

Control and interest in stock. A, in China trade, at N. Y., with branch at Canton, appointed B to take charge of Canton business, giving him 1-5 profits. Neither could engage in other business at Canton. B to have his living expenses, but to allow profits to accumulate in the business. Decree upon account stated between A and administrator of B. Bill to open, and for account as partner.—Though partnership, because of control and of interest in stock, i. e., labor and share of accumulated profits, bill dismissed, on ground of laches. Ogden v. Astor, 4 Sandf. 311 N. Y. (1850).

Buying and selling. Judgment against A & B, as endorsers. Debtor indemnified them, by giving them salt. A sold the salt on joint account, and applied proceeds in discharge of judgment. He had given a note of A & B for freight to defendant, who transferred it to plaintiff, with guarantee of *collection* (not payment). Plaintiff never enforced payment, supposing B was not a partner, and hence not liable. B had since become insolvent. Plaintiff, to excuse laches, denied partnership.—B held a partner, because a joint purchase, and agreement to share profit and loss of sale. Cumpston v. McNair, 1 Wend. 457, N. Y. (1828).

Purchase by one for joint commercial adventure charges him as a partner. A & B took bonds in payment of a debt to them as partners. On dissolution, they divided the bonds, and, being advised by counsel engaged in litigation about them to buy more, B bought 22 additional bonds in his own name. The litigation was successful, and B sold out at a profit. A's executors sued B's executors for half the profits of the transaction. The evidence was: 1, a power of attorney given to B by various bondholders, to control the market; B signed for 29 bonds owned by himself, and A & B signed jointly for the 22 bonds in dispute; 2, a document drawn, though not used, to request a trustee's resignation: A signed for 29 bonds, and again for the 22, but left a blank for another signature opposite the 22.—Recovery. A joint adventure. Wilson v. Cobb, 2 Stew. 361, N. J., E. & A. (1878).

2. The Professional perplexity is manifested in the enactment, which makes a lender, who takes profits for his loan, a cross between a partner and a creditor.[a] If a lender, he is entitled to reclaim his loan, like any creditor, and could not be postponed; if a partner, he could not reclaim his loan in competition with creditors, or escape his liability as a partner.

3. In trying to re-adjust the English cases prior to Cox v. Hickman, to the theory of principal and agent, C. J. DOE has endeavored to make out that the English judges confounded the distinction between law and fact. But he lost sight of the property element, which justifies them, by making the question one of law, and within the judicial province.

Eastman v. Clark, 53 N. H. 276 (1872).

4. Disregarding the light of the profits, or treating it as an *ignis fatuus* the courts are at the dead point, and cannot move until something else is applied as a momentum. Says C. J. DOE:

"Whether in a particular case, 'the profit' carries the one meaning "or the other, depends on the question whether he is a principal or a "creditor, which is the first, last and only question in the case. We "cannot know in what sense 'the profit' is used by the parties until we "discover whether A is a principal or a creditor. How can that be a "method of answering a question, which is a deduction from the "answer, and cannot be known until the answer is obtained? If A "is a creditor, he is none the more and none the less a creditor by "reason of his being entitled, as a creditor, to one-ninth of 'the "profit;' if he is a principal, he is none the more and none the less "a principal by reason of his being entitled, as a principal, to one-"ninth of 'the profit.' When A and B agree that A shall have one-"ninth of 'the profit,' they may mean that he is to have it in the "capacity of, and by virtue of his being, a creditor; they may mean "that he is to have it in the capacity of, and by virtue of his being, a "principal. The question is, Which do they mean? The sharing-"profit test merely repeats the question without answering it. A "may be entitled to one-ninth of a fund called 'profit,' either in the "capacity of a creditor or in the capacity of a partner, his ambiguous "right is not a test of the capacity in which he holds it. Taking part "of the profit is no more the act of being a partner than it is the test "of his being a creditor." Eastman v. Clark, 53 N. H. 296 (1872).

a. 28 & 29 Vict. c. 86.

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§56.

The title to profits, like the title to the contribution, is a property right, which cannot be asserted against the creditors of the firm.

Profits result from the use of the contribution. It is, of course, a mistake to represent profits as the product of nothing but the material capital of the firm. They are the product of all the factors which go to make the business a success. But, as is seen in the original structure of partnership, the services are summed up in the function of buying and selling property. The process is accessory; the property is

the principal. The profits have no independent status, but are merged in the contribution.

It is because the profits are an increment of the contribution, that the right to them discloses a partner. This is the converse of the proposition that a partner is a proprietor. What would be thought of a claim to the contribution, if made by a stranger? He would claim the attribute of a partner, while he pretended not to be a partner.

Mr. Justice DEGREY, in the passage which has become celebrated,[1] meant that the property-right to the profits was the basis of liability on the part of the trader. He is a proprietor, and is liable for his dealings as such. The reason, however, which the learned Justice gave for his statement, betrayed his confusion of thought. He asserted that taking profits deprived the creditors of the fund on which they relied for payment! But this is the exact result which is excluded by the terms of the proposition. The creditors cannot rely on that which does not come into existence until they have ceased to exist, i. e., are satisfied. SULPICIUS was the first to point out this absurdity, which he did in his notes to SCAEVOLA.[2]

The profits are no more a part of the fund for creditors than losses are. The word 'profits' is a relative term, and has a meaning only for the partners themselves. It is only between them that any portion of the assets can be deemed profits. The creditor may demand all the property, or assets, of his debtor-firm, because they are devoted to the payment of his claim. Should the partners divide the joint fund among themselves, and convert the joint into several titles, the withdrawal would be a fraud upon the creditor. But

the proprietors would not be charged because they took it, or any part of it, as profits. No profit could issue out of it until the creditor was paid, and after he was paid the withdrawal would not be a fraud upon him. The withdrawal does not create an original liability, but conflicts with the liability previously created.

1. *Interest, though usurious and payable out of profits, does not make lender a partner.* B bought out his partner, C, who left £4,000 of his capital with B, upon his agreement to pay 5 p. c. interest and an annuity of £300 for 7 years. A sued C as a partner.—Not liable. The extra 7 p. c., though usurious unless payable out of profits, was not contingent upon them, but a round sum due by B. If C received profits, his interest limited to a definite amount, and could not charge him indefinitely. But C had no specific lien on the profits, nor any interest in them, except through B, who relied upon them as his means of payment. "If anyone takes part of the profit, he takes "part of the fund on which the creditor of the trader relies for his "payment." Grace v. Smith, 2 Wm. Bl. 997 (1775).

2. "Mucius scribet non posse societatem coiri, ut aliam damni, aliam "lucri partem socius ferat. Servius in notatis Mucii ait, nec posse "societatem ita contrahi: neque enim lucrum intelligitur, nisi omni "damno deducto; neque damnum, nisi omni lucro deducto." D. 17, 2, 30.

"Suppose B, going into the retail flour trade with no capital, hires "A as clerk for one-ninth of the profit, buys 1,000 bbls. of flour of C "at $10. a bbl., sells it all at $11. a bbl. in one month, in a store hired "of D at $100. a month, and the business is then closed. A, C & D "having received nothing, and B having the $11,000, $10,000 of that "sum is to be paid to C for the flour. The remaining $1,000 is the "primary, gross, or sale profit. Deduct from that gross profit the "$100 due D for rent, and we have $900, the profit out of which the "deferred creditor A is to be paid for his services as clerk. Deduct "from that deferred creditor fund one-ninth of it due A, and we have "$800, the final or net profit of B the principal. Until they are paid, "A, C & D are creditors. C and D stand on an equal footing as "ordinary creditors; the fact that, in book-keeping, the debt to D "for rent may be recorded in the expense account does not affect its "existence as a debt: the debt to A for services may be recorded in the "same account. C and D are general, absolute creditors, relying for "payment on everything until they are paid: then, ceasing to be "creditors, they rely for payment on nothing. A is a deferred and "contingent creditor, entitled to nothing until C and D are paid, "and then entitled to nothing, unless some of the gross profit is "left. C and D, until they are paid, rely for payment on the "whole of B's property,—upon the $1,000 gross profit, as well as the "rest of the proceeds of the flour. They do not rely on the $900 "(deferred creditor fund) left after they are paid, nor on the $800 "(net profit) left after payment of all creditors general and deferred.

"If C is first paid, he takes part of the fund on which D relies for "payment: if D is first paid, he takes part of the fund on which C "relies for payment: but the one first paid does not, by the act of "receiving payment, become liable to the other for taking part of the

"fund on which they both rely. That is not the fund of which A is "to have one-ninth; and he is not liable to C and D for not taking "a share of the fund on which they rely. The fund of which A is to "have one-ninth is the $900 left after C and D are paid: on that fund "C and D do not rely; and A is not liable to them for taking a part "of the fund on which they do not rely. He is a creditor, though a "deferred one; and, as creditors, C and D do not become liable to "each other or to A by properly receiving payment out of the fund "on which they properly rely for payment, so A does not become "liable to them by receiving payment out of the fund on which he "relies.

"But if A, as a joint principal and co-partner, and not as a creditor, "is entitled to one-ninth of the profit, it is net profit that is meant; "and if he is entitled to a part of the net profit, he is liable to C and "D, not because he is entitled to a part of the fund on which they "rely,—for they do not rely on the net profit; he is liable to them "because he is a principal. If he is a principal, 'the profit' of which "he is to have a part means the balance of gross profit left after pay-"ing all creditors: if he is a creditor, 'the profit' means the balance "of gross profit left after paying all creditors but himself. * *

"In the supposed case, where A is a creditor and not a partner, "there are three different profit funds, or one profit fund of three dif-"ferent amounts and with the three different names,—1, $1,000 gross "profit, out of which, as well as out of the other $10,000, proceeds "of the flour, the general creditors are to be paid: 2, $900 deferred "creditor fund left after payment of the general creditors C and D; "3, $800 net profit, left after payment of the general creditors C and "D, and the deferred creditor A. An agreement of A and B that A "is to have one-ninth of the profit, means either that A is to be a "deferred creditor entitled to one ninth of the gross profit left after "payment of the general creditors as compensation for his services, "or that he is to be a joint principal and co-partner with B, entitled "to one ninth of the net profit. In the former case, 'the profit' "means neither the gross profit nor the net profit, but the $900, of "which the $800 left after payment of A is the net profit of the busi-"ness in which B is sole principal: in the latter case, 'the profit' "means the $900 net profit of the business in which A and B are joint "principals. The difference is, not in the amount which A is to re-"ceive, but in the capacity in which he is to receive it. In the one "case, as a clerk hired by B, and as a creditor of B, he is to receive "from B, in payment of his deferred debt, one-ninth of the amount "of B's gross profits left after payment of other creditors: his right "is a chose in action, not a thing actually or constructively in his "possession: the title of the ninth is in B, and not in A until he is "paid;—in the other case, as a joint principal, before he receives his "share, he owns, in common with B, the net profit left after pay-"ment of all partnership creditors of A and B: the title is in A and "B: A owns one-ninth, and B owns eight-ninths. In the one case, "the net profit is $800: A is a creditor of B, and not a principal: "B owes him $100 for wages which he can recover in assumpsit at "common law;—in the other, the net profit is $900: A is a joint prin-"cipal and not a creditor: B owes him no wages: their net profit "cannot be ascertained and divided in a common law action: for the "debts contracted by B, within the scope of his authority as agent in "earning that net profit, A would be liable, did not the existence of "net profit show that those debts have been paid.

"If A is a clerk and creditor, he receives $100, not as his share of "the profit of a business in which he is a joint principal, but as com-

"pensation for his services in a business in which B is sole princi-"pal: he receives one-ninth of the profit, not as profit, but as pay-"ment of a debt. If A is a principal, he owns one-ninth of the profit "as profit, and does not receive it as payment of a debt." Eastman v. Clark, 53 N. H. 295 (1872).

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§56.

The Roman standard has survived in the Common Law as the type of partnership.

The type of partnership handed down by tradition stands as the model of perfect fairness, and serves as the structure of partnership when the law is called upon to infer the terms of the contract. The inference is drawn from sharing the profits, that the share-taker has put a contribution into the firm equal in proportion to the quota which he takes out of the profits (§31, n. 1). The inference is merely a statement or expression of the natural terms of the adjustment which the parties would make if they dealt fairly by each other in the business. The right to demand a share in the product of the partnership relates to the interest of the share-taker in the capital of the firm. The claim to profits is founded upon the claimant's standing in the firm as a partner.[1] The legal inference is based upon the connection between profits and a contribution. If the profits are shared, the stock employed to make the profits is shared like them. It is with reference to the type of partnership that the contract of the parties is interpreted (§36).

The relation is maintained by the self-interest of the members. Though a partner, the individual has no interest apart from himself.[2] The firm supplies no new impulse,

and is merely a graft on the individual stock. The partner looks through the partnership to his ultimate self-interest, in the vista beyond. The Romans, seeing that the relation had no support but the self-interest of the members, made sure of their self-interest by a measurement of each partner's quota, and regulated his share of the profits according to the amount of his contribution. The partner could not deny his membership if he would, for his position in the firm was established at the outset, by investing him with a correlative proportion of the stock and profits as a member. The right to share the profits related back to the contribution, and was contingent upon it. The claim to share in the profits admitted the partnership, and, as the claim implied a contribution by the claimant, would prove that money which had been put into the firm was intended to be a contribution.

1. One who takes profits carries the insignia of proprietorship. He asserts the title of a proprietor, and he is taken at his word. The title and the profession are accepted as a fact. But it is argued by those who ignore the property element involved in partnership that the fact should be disregarded, as if it had no existence. There would, in this aspect, be no legal clue to determine the question of partnership. It would be left undecided, except when the parties had seen fit to disclose the intention which they entertained in transacting the business. The illustration given by C. J. DOE shows how hopeless would be the task, when partnership is treated as nothing but a case of principal and agent.[b]

a. Von Jhering, the genius of legal inspiration, has undertaken to prove that the selfish instinct can be sublimated in partnership and other combinations, and utilized as a disinterested motive; but he has relegated his proof to a subsequent volume, and until he produces it the hard headed sense of the Romans will be accepted as the standard..

Der Zweck im Recht, von Rudolph Von Jhering, vol. 1, 1877.

b. §55, n. 2.

§57.

The property-link, or connection, between contribution and profits has not been severed, but stands, at the present day, as the type of partnership.

The law does not require, as it did in the early days of Rome, that a share in the profits should correspond to the contribution. But the law does assume such a correspondence between the profits and the contributions, if the contract has not made a different adjustment.[1] The later Roman view, that the parties must have capitalized the services to make them equal to the contribution,[2] is the accepted basis of the partnership as to third persons. The contributing partner has agreed to accept the services of his co-partner as an equivalent for his contribution, and thus converted the services into firm capital. The effect is to invest the partner contributing his services with title to the firm property. Although the partners, according to the better opinion which has been set forth (§33), do not contribute property, but contribute merely the use of property to the firm, yet, for strangers, the title is vested in the firm. If the services of the partner were capitalized and accepted as a contribution, although they would, at best, entitle him only to a joint use of his partner's property, yet, for the purposes of the business, they would make him a co-owner of it, and, on that ground, a co-proprietor of the profits, which are the product of his own labor, and of the property employed in the business.

The mutual agency of the partners results from trade, or buying and selling property (§5). If the property employed in trade did not create an agency

in the co-trader, there would be no property clue to establish the agency. The delegation would be ascertained, like any question of authority, only by the intention of the principal.[3] Property owned in common does not give a part owner authority over his co-owner's purpart (§5). The fact might be disputed whether the property was owned jointly or only in common. Trading with it would settle the controversy at the Common law, because sharing the profits would identify the proprietors in the contribution through their shares in the product.[4] At the Civil law, the co-proprietorship is not decisive, even in trade, for the proprietors may join in business, and share its profits and losses without becoming partners (§51 n. c).[5] It is not the identity of interest which charges them as partners, but the private contract of the partners. The Civil law knows nothing of an undisclosed principal, and yet his liability is the key to partnership at the Common law.

The abandonment of the property element would take away the creditors' hold upon the partnership, and relegate them to a mental investigation. The external fact that the party is a co-proprietor, or dealt as such, is now sufficient to hold him as a partner. Taking the profits is dealing with the property as a proprietor, for they are the product of the property contributed to the business. The embodiment of the act, dealing as a proprietor, in matter and substance, is the tangible fact which singles out the partner, and identifies him with the business.

The effect of reverting to the intention of the parties as the exclusive test of a partnership would be undoing the work which has been accomplished dur-

ing the developement of modern partnership in England and America, and going back to the primitive status of partnership at the Civil law.[6] The Common law made a great stride in advance, when it converted partnership into an institute of credit, and enlarged its scope from a private bargain, which concerns no one but the partners, to a business establishment, which invites and commands the trust and confidence of third persons. The Common law, with its practical sagacity, adapted partnership to its modern function, and gave it a career which was not dreamt of at the Roman law.

It is upon the foundation of property that the modern structure of partnership is built. The co-proprietorship in business identifies the parties in interest, and justifies the reliance upon the proprietors as principals. Acting as a proprietor, or taking the profits of a proprietor, is equivalent to being a proprietor, and entitles creditors to treat him as such.

1. Syers v. Syers, §31, n. 1.

2. 15 Glück Erleuterung der Pandecten, 420–4.

3. *Co-owners sharing profits and losses of business transactions, not partners.* B, in N. Y., agreed to advance money, C to buy molasses in his, C's, name, warehouse and ship it in the name of D, who, upon delivery of warehouse receipts, or bills of lading, was to pay the price and expenses, and draw for the amount on B, who sold the merchandise. Profits and losses divided: B 1-2, C and D each 1-4, but B and D not disclosed in the transactions. C failed to pay over money received from D for the purchase of molasses to A, who sued D for the price.—Judgment for D. Parties did not intend a partnership. D, if an unknown principal, or a purchaser, of C, not liable for his misapplication of purchase-money.—Dissent. Shared the losses, and were co-owners. Chaffaix v. Lafitte, 30 La. An. 631 (1878).

4. *Sharing profits indefinitely, without any control or management of the business, makes the share-takers partners, in spite of their intention.* B, at Plymouth, agreed with C, at Gosport, to remove to Cowes, in order to co-operate as ship agents, for 7 years, with option by C to renew. Each retained 1-5 commission for expenses. Then C received 1-2 B's commissions and trade discounts, for recommending him. B received 1-4 C's commissions and 1-2 p. c. of his trade discounts, and for ships which he induced to proceed to C, 3-5 commissions and 1 1-2

p c. trade discounts, with 1-4 storage fees. C stipulated for warehouse at Cowes, without B's interference, and gave him 1-6 storage fees. Neither could form other business connections for ship agency at either port during the term, nor B after the term, at Portsmouth or Gosport. Provision for annual settlements, when accounts were stated and balance distributed. Each assumed risk of all losses in his own business, and stipulated not to incur liability for losses in the other's business. A sued C on a contract made by B in his business, carried on in his name as ship agent.—Liable, because he shared in the profits of B's agency indefinitely, and in spite of the intention of both parties not to be partners, but of each to carry on his own business separately. The partial control exerted by C over B's business was insufficient to overcome the intention that he should remain master of his own business. Waugh v. Carver, 2 H. Bl. 235 (1793).

Sharing commissions a partnership in consignments. A, merchants in London, and B, at Rio, shared, without any deduction for expenses, the commissions on consignments secured by either for the other. A paid over remittances for sales made by B. A, upon the report of a sale by B of the goods consigned to him by C through A's influence, advanced the price to C, in expectation of a remittance from B. He became bankrupt, and A's assignees in bankruptcy sued C, to recover the advances.—No recovery, as A & B were partners in the consignment. Cheap v. Cramond, 4 B. & Al. 663 (1821).

Sharing profits, with renewal of business. B & C, Americans, were partners in France, trading with U. S. They dissolved, on account of war between France and England. B returned to N. Y., C remained, each agreeing to make and procure consignments to the other, and to share the profits and commissions. Each retained 2-3 of earnings of his own establishment, and gave 1-3 to the other.—C liable, as partner in B's establishment, to A for merchandise. Walden v. Sherburne, 15 Johns. 409, N. Y. (1818).

Sharing profits makes partner. B sold out to C & D, two of his copartners, who continued the business, and agreed to pay him an annuity varying with the profits. Joint commission in bankruptcy issued against the five. A, their assignee, prayed for stay of proceedings under other commissions until B's position was determined. —Stayed, because he reserved a share of profits in the business, and decree that B was still a partner. In Colbeck & Co., ex parte Wheeler, Buck 48 (1817).

Royalty or profits. A gave B use of factory and supplied cash capital. A to receive 1 p. c. a yard profit on production of cloth, not exceeding 6,000 yards a week. B received, for services, remaining 99 p. c., and the entire profit on number of yards above 6,000. Business conducted in B's name. Creditor sued A on order given by B for labor.—A liable as partner, because he received, not a royalty, but a share in the net profits. Everett v. Coe, 5 Denio 180, N. Y. (1848).

The rights of third persons are independent of a partnership contract, and may exist though the contract should fail. Usury, which would deprive a lender of his bargain, doesn't relieve him from liability to third persons on the unlawful contract. B stocked a store, and C carried on the business. The contract was to pay B 6 p. c. for his loan, and, if the business successful, 25 p. c. out of profits. C confessed judgment to B, for the loan, and he took the stock in execution. A obtained judgment against C, and enjoined sheriff from paying over the proceeds of sale to B, on the ground that he was C's partner.—The contract to share profits made B liable, as a partner, though the contract was usurious, and void between the partners. Sheridan v. Medera, 2 Stock. 469 E. & A., N. J. (1855).

Advance for a building operation payable out of proceeds in addition to a share of the profits and losses is not a usurious loan, but a contribution to a partnership. A furnished $3,000, to buy a lot which B improved by a building operation. B gave his bond to repay the sum, with interest, out of the proceeds. A & B shared the profit, in proportion of 1 to 2. A sued for his share.—Recovered. A partnership, not a usurious loan. Plunkett v. Dillon, 4 Houston 338, Del. (1875).

Sharing profits, without mentioning losses, makes partnership. A & B, who were doing business as the "—— Tub Co.," furnished factory, stock and capital, and C managed the business. The sign and printed designation of the firm were: —— *Tub Co., A B & Co., A B & C.* They shared the profits equally, but said nothing about losses. Business failed, and A & B demanded an account. Defence: No partnership, because no agreement to share losses.—Partnership. Agreement to share losses implied from agreement to share profits. Munro v. Whitman, 8 Hun. 553, N. Y. (1876).

Agreement for half the profits, made in answer to advertisement for a partner, sufficient for jury to find a partnership. Partner in possession a lien on firm stock against a chattel mortgage executed before the partnership. The "A" Lumbering Co. executed a chattel mortgage to A. The Co. advertised for a partner, and agreed to give B, who answered the advertisement, 1-2 the profits for carrying on the business. A, under his mortgage, replevied stock in B's possession. Charge: Agreement gave B a lien, whether a partner or not.—Error. No lien unless a partner. Agreement, coupled with advertisement, might have been sufficient for jury to find a partnership. Wilcox v. Mathews, 44 Mich. 192 (1880).

The principle is not confined to partnership, but prevails throughout the law. The profits represent the property, and are the sum of its usefulness to man. The property and its resources of enjoyment are convertible terms, because they are one and the same thing, though looked at in different aspects. From the time of LORD COKE and his 'boillourie of salt,' a gift of the profits has been a sufficient designation to pass title to the property. An instance may be taken from a branch of the law entirely foreign to partnership. The principle serves to distinguish vested from contingent legacies:

A bequeathed to B the interest of Pa. state loan, and the principal when it should be paid by law. B died before payment of the principal. His administrator sold the stock, with a guarantee of the title. The buyer sued the administrator on his guarantee, in order to test the title. The court explained the identity of the interest, and principal: The nature of the fund is single, but its enjoyment varies on account of the investment. They are different forms of enjoying the fund, the interest, while it was invested, and the principal when it was paid off. The legatee had a certainty in either aspect, unaffected by the change in form of the fund. The legacy vested the fund in B at A's death. Schriver v. Cobeau, 4 Watts 130, Pa. (1835).

5. "Deux marchands vont ensemble à une foire, et pour ne pas se "nure par une concurrence que les ferait peutêtre suracheter, ils "conviennent de faire tous leurs achats en commun pour les partager "ensuite. De fait, chacun d'eux achète sepárament ce qu'il trouve

"d'avantageux;' puis, tout est rapporté en une masse, et l'on fait les "lots suivant la convention." TROPLONG, Des Sociétés, ?487.
5 & 6. n. 3, *supra.*

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§58.

A misconception of the principle made a compensation out of profits the proof of a partnership.

The word sharer,[1] like partner, means one who shares or divides, and the sequence is that he shares, or divides, what he owns in conjunction with his co-proprietors. He shares in the capacity of an owner. The legal effect did, at one time, correspond with the import of the word, and charged the share-taker with liability, as a partner, against his intention, and in spite of his will. He made himself a principal in the business, and he would not be permitted to avoid the consequences of his act by disproving a partnership *inter se.*

The word "sharing," however, came to be taken in a loose sense.[2] It was held that a partner is one who, without reference to property or proprietorship, receives part of the profits. By this construction, Tom, Dick and Harry were turned into partners, for no other reason than that they lent money to a firm, sold it merchandise, or rendered it services, and were paid out of the profits. For a wonder, the extravagance of the conclusion did not lead to a detection of the blunder, which consisted in confounding the distinction between the two meanings covered by the term 'sharing.' The word palters in a double sense. It means: 1, The part of profits which belongs to its owner; 2, A

sum paid by the owner out of profits. In its primary sense, 'sharing' profits is an incident of ownership, and is therefore proof of a partnership. In its secondary sense, the profits shared are the price paid for something. So far from being evidence of partnership, the share establishes the opposite relation of debtor and creditor. The cause of the confusion not being detected, all reasoning on the subject was corrupted by the original sin. It recurs in the argument which makes intention the guide: The wish for gain is the original motive which calls the partnership forth to make profits, and the motive is the index of the parties' intention. The profits are the cause, and partnership follows as the effect. From the cardinal proposition, that nothing but profits could make a partnership, was deduced the corollary that no profits could be shared except by partners. Hence, a sharing in the profits became conclusive evidence of partnership. In this argument, apart from a missing link, which is needed to complete the chain of reasoning, the word sharing, in its secondary sense, is given the effect of its primary meaning. The sharing permitted to a creditor is confounded with the sharing by virtue of a proprietor's title.[2] The misuse of the word vitiates the test of partnership.

The link left out is the means of accomplishment, which must precede the result. The incentive, which operates upon proprietors, and induces them to join in business to make profits, may be felt by others, but it does not stimulate them to contribute the property, which is the means employed to make the profits. The end must not only be desired; it must be willed, and the object of the will is the joinder of proprietors

in business. They will the joinder, which is partnership, as the means to share the profits.

1. A percentage is the usual measure of a quota,[a] but the ascertainment need not be made by a rate or proportion; nor need the share be an aliquot part of the profits.[b] A round sum in instalments, taken in turn,[c] an annuity,[d] a royalty,[e] rent,[f] or any other way,[g] is sufficient, if the amount, however computed, is payable out of the profits.

2. "The distinction between taking profit as profit, and taking it not "as profit but as payment of a debt, is a familiar one, firmly estab-"lished by the authorities, but not always explained as clearly as it "might be. It is the distinction between a partner and a creditor "obscurely expressed. Taking a share of the profit as profit, is tak-"ing it as his profit—as profit of his flour business—as the profit of a "principal,—taking it in the capacity of a principal trader—an owner "of the profit—a partner: taking a part of the profit as payment of a "debt, is taking it in the capacity of a hired man or other creditor. "If A is clerk and creditor, we mean by his share of the profit what "is his when it is paid to him by his employer, but, until then, is his "in a figurative sense only. If he is a clerk and creditor, what is "called his share of the profit belongs, as a matter of absolute legal "title, exclusively to B until he pays it to A, and then belongs ex-"clusively to A: it does not, at any time, belong to A and B in com-"mon, or in any manner indicated by the ordinary signification of "the terms 'share of a partner.' But, if A is a joint principal, 'his "share' is 'the share of a partner' in the next profit. The indis-"criminate use of the word 'share,' signifying the amount of his "wages and debt if he is a clerk and creditor of B, and signifying his "ownership of a part of the profit in common with B, if he is a prin-"cipal is a cause of confusion. The distinction between the two sig-"nifications of 'share,' is the distinction between a creditor and a "partner." DOE, C. J., Eastman v. Clark, 53 N. H. 297 (1872).

3. The appointee of the proprietor takes through him, and by virtue of his dominion (§54). The delegation of power, if proclaimed, excludes the idea of proprietorship in the recipient. He takes *en autre droit.* A contract to pay over the profits *a fortiori* excludes a title to them as proprietor, and establishes a claim for them against the proprietor. The ideal case of the merchant prince of New Hampshire and the poor missionary could arise only under the loose sense given to the word sharing.

"Suppose a New Hampshire merchant, having gained a sufficient "estate in trade, and desiring to continue his business for the indus-"trial and charitable purpose of supporting a missionary in Ceylon, "gives him a bond to pay him all the future profits of his business; "and suppose the profits are called 'net profits' in the bond: was "there ever a court that would hold the missionary liable as a part-"ner for the goods bought by the merchant in carrying on his busi-"ness? It would be evident that they both understood the missionary "to be a creditor and not a partner; that, by 'net profits' they meant

"the surplus of gross profits left after paying all other creditors of the "business; and that, in the literal sense, there would be no net profits "of the business. Why should the missionary be liable, especially "seeing he was not to defraud the other creditors; but only to receive "the balance of profits left after they were all paid?" Eastman v. Clark, 53 N. H. 341 (1872).

a. *Commission to partner on business for services referred to profits.* A & B, partners, agreed to give C "10 p. c. on the business" for his services as financial manager. Each might furnish capital at 7 p. c. Profit and loss divided: 1-3 to C, 2-3 between A & B, according to time they respectively worked. A & B brought bill against C, who took no exception to master's finding that he was a partner.—C's 10 p. c. limited to profits, because if business done at a loss C would pay back 1-3 of commission on the gross amount. Funk v. Haskell, 132 Mass. 580 (1882).

b. Ex parte Chuck, 8 Bing. 469 (1832), §52, n. 1.

c. *Taking profits in alternate layers, partnership.* B sold a newspaper, with the plant, to C, for £150, payable, with interest, in instalments during 7 years. B guaranteed £150 a year to C, beyond annual instalments, and C accounted for profits exceeding such £150, and up to £500, to B, with right to take surplus over and above £500, if he assumed £250 of existing liabilities of the newspaper. A sued B for paper supplied to C.—Liable. Because B & C intended to share the profits. Barry v. Nesham, 3 C. B. 641 (1841),

d. In Colbeck & Co., ex parte Wheeler, Buck, 48 (1817), §57 n. 4.

e. Everett v. Coe, 5 Denio 180 (1848), §57 n. 4.

f. *Rent or profits.* Corporation leased its mills to A, and received, in lieu of rent, 1-4 annual profits, half of which remained in business, at compound interest, until close of term. Corporation was sued as partner on bill of exchange given by A.—Liable as to third persons, in a partnership for a purpose not *ultra vires*. Catskill Bank v. Gray, 14 Barb. 471 (1851).

A lent B $1,000, leased him store for a year, with son, C's, services gratis. B agreed to invest $3,000 in business, and manage it for a year, rendering account to C, who should have 1-3 profits, and might demand re-payment of loan and possession of store at close of year.—A liable as partner, in suit by creditor. Cushman v. Bailey, 1 Hill 526 N. Y. (1841).

g. *Surety who shares profits of working contract, a partner with contractors.* B was surety for C & D, contractors for construction of a railroad. They agreed to give him, for going security, 1-4 clear profits, also 10 p. c. on advances, and to secure him, by orders on the company, for money due them. A, a mason, sued B, as a partner of C & D, for work and labor done. Obtained verdict.—Sustained. B's sharing in profits of working contract made him a partner. Heyhoe v. Burge, 9 C. B. 431 (1850).

Holding out charges the party who permits it, although creditor did not know of it, as does bargain for rate varying with sales. B stipulated to transfer her customers in the coal business to C, and to recommend others to him; and C agreed, in return, to pay her an annuity and two shillings a chaldron for coal sold to customers whom she should induce to buy of him. A sued B & C for the price of coal. Evidence showed that bills to her customers were made out in the joint names of B & C, though A did not know it, and did not sell on

her credit.—Liable, because she suffered her name to be held out, though A did not know it when he made the sale. The contract for a rate which varied with the sales would also make her a partner. Young v. Axtell, 2 H. Bl. 242, *arguendo* (1784).

Husband entitled to wife's profits, liable as partner, though not bound by contract. B, married woman, and C entered into partnership, B contributing her separate estate. A brought action against B C & D, B's husband, for firm debt.—Recovered. B under disability, but D, who shared his wife's profits, liable as a partner. Miller v. Marx, 65 Texas 131 (1885).

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§59.

As the extension of the word 'sharing' would make everybody a partner who partook of the profits, the law was preserved by denying the effect of a partnership, unless the sharing was in the capacity of a principal or proprietor.

On account of the ambiguity created by letting non-proprietors, as well as proprietors, 'share' the profits, it became necessary to re-establish the distinction between the two kinds of share-takers. The adherence to precedent, which made the Bar and the Bench cling to the original effect of sharing profits, unless an exception was forced upon them, served the turn, and enabled them to tide over, by tradition, the period of uncertainty. Thus the original meaning of the word 'sharing,' though broken down as its exclusive import, has nevertheless been preserved. The word retains its primary signification, until it is overcome by proof of its use in the secondary sense. The primary meaning prevails, and controls the construction of the term. The context must destroy this implication of ownership, and substitute a different relation, i. e., of debtor and creditor, or master and servant, in order to overthrow the original import of the word.[1]

The original meaning of the word has been restored in the modern definition of a partner: One who shares the profits 'as profits,' in other words, as a proprietor. The exceptions established the secondary sense of the word, or sharing as a non-proprietor. But they were not permitted in derogation of the rule, which embodied the primary meaning, until they were justified by proof of sharing as a non-proprietor.[2] The result is expressed in the statement that sharing the profits makes out a *prima facie* case of partnership, that is to say, the law interprets the phrase sharing the profits in the primary sense, unless the presumption is rebutted by proof of its use in the secondary sense.[3]

If the sharing did not indicate a proprietor, there would be no reason even for the *prima facies*. The sharing would not be evidence of any relation, until that relation was proved, when the evidence would be superfluous. The sharing being consistent with the relation of debtor and creditor, or master and servant, as well as with that of partners, would not tend to prove one relation more than another (§54, §55 n. 4).

1. *Profits presumed to be shared by title of proprietor, unless a different right is proved.* A sued B & Co. on promissory note for $2,700, endorsed to him by B & Co. Court charged: 1, that demand at place of business, or residence, of a partner was sufficient; 2, that if C was interested in the profits of the business, or represented himself to be a partner, he was liable.—Judgment for A. Sharing profits *prima facie* evidence of partnership, and unless proof of sharing was in a different capacity, conclusive. Fourth National Bank of St. Louis v. Altheimer, 3 S. W. Rep'r 858, Mo. (1887).

2. The exceptions to the rule, that a share in the profits made the share-taker a partner, were based upon the fact that the partaker was not a proprietor of the business. The agent did not share the rank and dominion of the principal. No one could be a partner who was not a principal in the business.[a]

First. The wages or salaries paid to employees are nothing but stipends for services rendered by them. The

payment out of profits does not subvert the relation of master and servant.[b] The change is only in the mode of payment; a variable and contingent amount is substituted for a fixed sum, for the mutual benefit of both parties. By making the wages dependent upon success in the business, the servant has an inducement for his exertions, and the master reduces his outlay.[b]

A share of the profits in addition to the salary does not change the relation.[c]

a. *Unless a principal in the business, not a partner.* A offered to prove against an insurance company for an annuity. She belonged to the class which participated in the profits, and they, with the bonusses, were distributed annually. The company amalgamated with another company, and was ordered to be wound up, but A never assented to the transfer. Defence: A was a partner.—Proof allowed. Company was not her agent. She had no voice in the management or division of the profits, nor could she maintain a bill for an account of them. In re Engl. & Ir. Ch. & University Ass'ce Society, 1 Hem. & M. 85 (1863).

Partaker of profits, unless a principal in the business, is not a partner. B had a government contract for grave-stones, and employed A to superintend work, at $3 a day and 1-2 the profits. A brought account, as partner, against B.—Account allowed, but no partnership, because A was not a principal in the business. Hargrave v. Conroy, 4 C. E. Gr. 281, N. J. (1868).

Burckle v. Eckhart, §53 n. 1.

b. *Half profits for services no partnership.* A rented and stocked a country grocery, and paid for liquor license issued to B. B managed the business for 1-2 the profits. His separate creditors levied on the goods. A replevied.—No partnership. Title exclusively in A. Lamb v. Grover, 47 Barb. 317, N. Y. (1866).

B furnished capital to start C in business, and gave him 1-2 profits. A attached stock as property of C.—Dissolved. C not a partner, and property belonged to B. Pond v. Cummins, 50 Conn. 372 (1882).

B employed C, as agent, to sell or let land, giving him 1-2 profits. B's devisee, A, brought ejectment against C, who claimed title as partner.—Recovered. C simply agent. Blight v. Ewing, 1 Pittsburg 275, Pa. (1856).

c. *Profits as part of salary no partnership.* A received 1-3 profits in addition to salary. In suit by firm, defendant objected to non-joinder of A as plaintiff.—Should not join, because not partner. Vanderburgh v. Hull, 20 Wend 70, N. Y. (1838).

Insurance in B's name, carried on by A, as agent, subject to B's control. A received salary of £150 a year and 1-5 profits, B 4-5 profits and all losses. If unexpected loss occurred after annual division, A to contribute to pay it, but not beyond his 1-5 profit. A brought account.—Did not lie, because no partnership. Ross v. Parkins, L. R. 20 Eq. 331 (1875).

Second. The principle of hiring is not limited to menial servants, but extends to any employment, in which the employee is subject to the direction and control of the principal.[d] The captain who took command

of a ship during a whaling cruise for a share in the profits, instead of a salary, is an employee, and not a partner of the owner.[e] The cashier and bookkeeper of an establishment, who received a share of the profits for his salary, did not become a partner, because the money payable for his services was the earnings of the business.[f] A clerk employed by a firm to drum up customers is not one of the heads of the firm, because he shares the profits of his sales, less his proportion of the general expenses of the business. He is limited to the faculty of selling, and has no other capacity in the business. The profits do not change his status.[g] The surgeon and apothecary, who sold out his shop and good-will, stipulating for 1-2 the profits during the year while he introduced his customers and patients to the buyer, is not a partner.[h] He remained in his drug store during the year, in order to transfer his business to the purchaser. He did not become a partner by sharing the profits. He reversed his position as principal, in order to substitute the vendee as his successor. The interval was not a joint reign, but simply the beginning of a new dynasty. An attorney, who took half the profits for his fee, is not a partner with his client.[i] The attorney acts by the direction and under the control of his client.

The amount of profits the employee bargains for does not affect the relation, except as evidence that the form of payment is meant to disguise a partnership. A manager, who received 40 p. c. of the profits, would be an employee, unless other attributes showed him to be a proprietor of the establishment.[j] He had no badge of a partner, except a share of the profits. He had no authority nor liability, but was subject to the direction and control of the principal.

d. Salary. A B & C had a contract to build turnpike. D agreed with them to construct a portion, dividing profits with them, in proportion to work and expenditure. D brought assumpsit for his share of profits. Defence: Should have brought account.—No partnership. Muzzy v. Whitney, 10 Johns. 226, N. Y. (1813).

e. Sharing profit and loss of cruise no partnership. B, the captain, had 1-5 the profit and loss of the ship and cargo on a voyage. C, the owner, sold the ship and cargo while at sea, to D, to secure his advances. B reported his arrival at Cowes to D, who did not take possession, and alleged, as excuse, that B was a partner.—Bound to take possession, in order to complete title, and B's share was in payment of wages. Mair v. Glennie, 4 M. & S. 240 (1815).

A was captain for 3 years whaling cruise, at 15 p. c. profits. B, owner, recalled ship before expiration of period, and A sued for

breach. Defence: Partner.—Recovered. Brown v. Hicks, 24 Fed. Rep'r 811 (1885).

f. Promise for share of patent, for assistance in perfecting it, no substitute for salary as clerk. B had salt works, and A acted as his cashier and bookkeeper for 4 years, without any agreement fixing a salary. Then, according to A's testimony, £250 a year was fixed as his compensation. During the 4 years, A also assisted in perfecting a patent for manufacturing salt, and B promised him a small share in it for his assistance. A offered to prove for 4 years arrears of salary.—Rejected below, because A looked to his share in the patent for remuneration; above, because, though he was a clerk, the evidence was insufficient to fix the amount of his salary. Ex parte Hickin, 3 De G. & S. 662 (1852).

g. Salesman not a partner. A, who had previously employed B to secure custom, and had given him a commission of 15 p. c. on the profits of orders secured by him, agreed to share with B the profits of his orders after deducting the expenses of procuring and filling them, and a rateable part of the rent and maintenance of A's shop, in which the business was transacted. A sought to prevent B from collecting draft received in payment of a debt from customers secured by him.—Defence: Partnership.—B not a partner. Though engaged in the business, he had no control over it; no right to receive payment for sales which he secured or negotiated; he was salaried by A. Sharing profits is only one of the consequences of partnership. Andrews v. Pugh, 24 L. J. Ch. 58 (1855).

h. Profits may be shared as a salary. B, a surgeon and apothecary, sold his practice and drug store to A, for £900, part cash and balance at end of the year. B, who continued to attend to the business, and introduced A to his patients and customers, received 1-2 the clear profits of the business for the year. A sued B for moneys received by him,—Recovered. No intention to be partners, but B received the profits as a salary. Rawlinson v. Clarke, 15 M. & W. 292 (1846).

i. Purchase of claims by attorneys for half profits in lieu of fees neither a partnership nor a trust. B & C, attorneys for A, bought prize-claims for half profits. A demanded account, judgment for balance due, and assignment of claims producing less than cost. He arrested B on execution, as a defaulting trustee. Defence: Partnership which excludes a breach of trust.—Action, in substance, for money had and received sustained. No partnership and no trust. Prouty v. Swift, 51 N. Y. 594 (1873).

j. Salary, equal to a share of the profits, don't convert manager into a partner. B & C agreed to give A, as manager, a salary equal to 40 p. c. of their profits, and reserved the right, upon a breach of the agreement by A, to discharge him after 21 days notice. They exerted the right, and excluded A, who brought bill for injunction and specific performance.—Bill dismissed, because sum equal to profits is not profits. Stocker v. Brockelbank, 15 Jur. 591; 3 Mac. & Gord. 250 (1851).

Third. The exception presents itself in another aspect, and verifies the principle by a different application. The servant or employee could be indicted for larceny, although entitled to a share of the profits.[k] If a partner, his right to deal with the stock would be a de-

fence to the charge. The exception admits that a partner must be a proprietor, and that sharing the profits *per se* does not make him a proprietor.

k. *Servant may be paid by a share of the profits.* A owned a colliery, and employed B, as a captain, to carry coal to market and sell it, giving him 2-3 of the difference between the cost price at the mines and the market price, for his services. B sold coal and embezzled the price. A indicted him for larceny as a servant. Defence: B joint owner of the money.—Convicted. B employed by A to take coal to market and bring back money to him. Sharing profits the mode of payment, which did not convert B from a servant into a partner. Hartley's case, Rus. & R. 139 (1807).

Sharing profit doesn't involve sharing loss, inter se. B agreed to take charge of glebe land for A, at 15 sh. a week, until the following Michelmas, and afterwards at a salary of £25 a year, and 1-3 clear annual profits, after deducting all expenses, rent, labor and interest on capital. B was indicted as a servant, for embezzling A's property. Defence: A's partner.—Convicted. No sharing of loss *inter se*. Reg. v. Wortley, 15 Jurist 1137 (1851).

Clerk with share of profits liable on capias as trustee. A furnished capital and B his services for 1-2 the profits. A took B on capias in suit for money received in the business. Defence: Partnership.—Capias proper. Profits for services. B held as trustee for A. Merwin v. Playford, 3 Rob. 702, N. Y. (1865).

Fourth. The agent for the management of the proprietor's business is but an employee, though he approaches in dignity a proprietor. As long as he does not act on his own behalf in conducting the business, or deal with others as a principal, he is not a proprietor.[l] The moment he acts for himself, or as if he were the principal, he becomes, or is liable as, a proprietor.[m] The decision which established the exception did not make a revolution in the law of partnership, although it is generally so regarded. The case did not even create an innovation or mark a new departure in partnership law.[n] The exception falls within the recognized class of subordinates, and hardly deserves a separate classification.

A creditor, at one period, was not compelled to execute a deed and release the debtor who made an assignment, because by taking the debtor's business, and working it up, he ran the risk of becoming a partner.[o] This position was not maintained. The taking charge of the debtor's business was limited to the purpose of liquidation, and was simply working out the debtor's debt. There was no profit in the business for the creditor, who worked to relieve the debtor, and secure his own claim.[p] It was different if the creditors took the

debtor's business and carried it on for their own profit, without a resulting interest to the debtor, after his debts were satisfied. The going into business made them partners, and the debtor's failure served as the occasion. The object was to engage in the business, and not merely to obtain payment of their debts.[q]

3. *Profits prima facie evidence of partnership.* By specialty, B lent C & Co. $10,000 for one year, stipulating for interest and if amount of profits of business exceeded $10,000 for 10 p. c. of such excess. Bond renewed four years in succession. B received profits under arrangement, and upon his death C & Co. became insolvent. A sued B's administrator on notes made by C & Co.—Non-suit. Profits, as *prima facie* evidence of partnership, rebutted by evidence more consistent with a loan. Meehan v. Valentine, 29 F. Rep'r 276, U. S. C. C., E. D. Pa. (1886).

Profit called consideration for loan, a partnership, unless excluded by proof of a different relation. B lent money to C, to buy and sell cotton, wool and hides, for part profits of business. A sued B for merchandise.—Recovered. Partnership not negatived by proof of a different relation. Cothran v. Marmaduke, 60 Texas 370 (1883).

Sharing profits prima facie partnership. A furnished capital, B his services, and divided the profits. Both sued C for price of goods sold in name of A & Co. Defence: C not a partner.—Recovered. Greenwood v. Brink, 1 Hun 227, N. Y. (1874).

Share in profits prima facie partnership, and amount not dependent on contribution to stock. A sued B for account and his quota of loss. B contributed his services and $64 out of $9,000. He was entitled to 1-2 the profits.—Liable. A share in profits *prima facie* partnership, and need not correspond to contribution to capital. Hodgman v. Smith, 13 Barb. 302, N. Y. (1852).

l. *Creditor receiving payment from profits of business continued under his management by debtor, is not a partner.* B manufactured machinery, which was sold on commission by C. Being largely indebted to C for advances, B, in order to secure him, surrendered the control and management of his business to C, until his claim should be reduced to $10,000, and also agreed to contract no debt without C's consent. C appointed a superintendent to take charge, and B continued the business under his direction. B gave notes, for materials, to A, who sued C as a partner. Court charged that carrying on the business under the arrangement made C a partner.—Reversed, because there could be no profits while C's claim was unpaid, or if C did take profits he received a fixed sum, and not a variable amount of profits, as such. Brundred v. Muzzey, 1 Dutch. 268, N. J. (1855).

Carrying on debtor's business for creditors' payment does not make them partners with the managers. B failed, and assigned his business to C and 4 others, trustees, who carried it on, subject to the control of B's creditors. The profits went as B's property, to pay the creditors, who accepted them in satisfaction, and as soon as they equaled his debts the business reverted to B. D & E were appointed trustees, but D never acted, and E resigned, after acting for 6 weeks. Subsequently C accepted draft drawn by A for the price of materials used in the business. A sued D & E, as acceptors.—Not partners. The sharing profits was a mode of payment, and the trustees were agents of the debtor, and not of his creditors. Cox v. Hickman, 8 H. L. 268 (1860).

m. Contributions by creditors to debtor's business, and sharing the profit and loss, make them partners. B, who had an oil mill in Boston, failed, owing A & C, in Boston, and D, in London. By an agreement, for one year, subsequently extended for two, A imported seed from Calcutta for the mill, receiving, in payment, B's draft on D for 1-3, and on C for 1-3, and B's note for the final 1-3. A insured the seed on the voyage, and on a loss accounted for any surplus to the other three, and claimed any deficit out of the proceeds of the mill. D sold the cake, and accounted for the proceeds. Any loss on the contribution of A, C or D was to be made good out of the proceeds of the business. B received a salary, and the four divided profits equally. The three agreed not to sue B while this arrangement lasted, and took a conveyance of his real estate as security. A imported seed, which fell in price during the voyage. D refused, in advance, to pay draft for his share of price. B, therefore, was unable to take the seed. A sold it at a loss, and sued D on the contract for damages. Defence: Partnership, and A should have demanded an account.—A partnership, but contract to contribute antecedent to the relation. Wills v. Simmonds, 8 Hun 189; 51 How. Pr. 48, N. Y. (1876).

n. Creditors, who let insolvent trade under their inspection and control, and take his receipts, are not his partners. B, a horse dealer, assigned, for creditors, to A, trustees. The deed allowed B to carry on the business, at a weekly salary, under the orders of A, who might, if B disobeyed them, take possession, and the receipts went to A's account. B continued the business in his own name, and contracted new debts. He disobeyed A, who took possession of his stock and trade. Two days later B committed an act of bankruptcy. A claimed horses in hands of third persons, and B's assignee in bankruptcy interpleaded, on ground that A was B's partner, and liable for debts contracted by B under A's direction.—A recovered. He was not a partner with B, as he had no interest in the profits while B carried on the business. B was solely interested in them, as a fund for the payment of his debts. Though A had control of business through B, who contracted debts in its management, A's exertion of his power reserved by the deed to take possession of the stock, was not a fraud upon B's creditors, who knew nothing of the secret arrangement. Price v. Groom, 2 Exch. 542 (1848).

Creditor bound by assignment, which continues debtor's business, if only for liquidation, Assignment by C, a debtor, to A, a trustee for creditors, to wind up C's business, pay expenses, and apply the proceeds in payment of his creditors. A, in his discretion, might carry on the trade and employ C to conduct it. B, creditors of C, obtained judgment against him, and seized the goods, on the ground that, as the assignment might charge them as partners, it was void. A claimed the goods in a feigned issue.—Assignment valid. The business could not be carried on except for liquidation, and the creditors incurred no risk of being held as partners. Janes v. Whitbread, 11 C. B. 406 (1851).

o. Creditor not bound to join in deed of assignment to carry on debtor's business for their benefit. Assignment by C, a debtor, to A, trustee for creditors, who should execute deed. The trustee was to carry on the business, pay costs, reimburse himself, and divide the profits among the signers in payment of their claims, and turn over the surplus to C. B, a creditor, who did not sign deed, obtained judgment and seized goods which A claimed in a feigned issue.—

Deed invalid as to B, who was not bound to join and incur risk of being held a partner. Owen v. Body, 5 A. & E. 28 (1836).

p. Cox v. Hickman; Brundred v. Muzzey, *supra*.

q. Wills v. Simmonds, *supra*.

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§ 60.

The distinction between profits and a sum equal to profits is based upon sharing the profits as a proprietor and sharing them as a non-proprietor.

The reasoning to support the distinction admits this foundation. The sharing was called a commission, which might correspond to a rate of profits, but could not give a right to them. The commission, so the argument ran, is a debt due by the partners, not a joint right with them. The difference between a commission on the profits and a share in the profits is measured by the opposition which exists between a right and an obligation. The sharing is an act which recognizes a title of ownership, vested in different claimants, and gives effect to the right, by dividing the fund between them. The act is neither a gift nor a bargain and sale, and would be designated a theft, unless the taker could establish a proprietary right to the fund. No stranger can take a share of the profits any more than he can take control of the business. The sharing cannot be made, except among co-proprietors. In short, the sharing is restricted to a proprietor, and the non-proprietor has only a claim against the proprietor.[1]

Now, add that the character of the act is a fixed fact, which cannot be altered by phrases, and the result is the

distinction stated. The effect of the contract is a conclusion of law, which is paramount to the intention of the parties. No arrangement can be devised which will enable a stranger to secure the benefits of a partnership without incurring the liabilities of a partner. The law would not suffer itself to be circumvented by a subterfuge. The test of sharing the profits, which established partnership as a conclusion of law, could not be vitiated by making it a play of words. Calling a share in the profits a debt, would not make it so, unless it was a debt in reality. The parties, it must be borne in mind, do not regulate the matter, but it is determined by the real character of the transaction. To permit them to settle the question, and that, too, by a phrase, would be to put a creditor's right in the hands of his debtors, and let them juggle with it at their caprice. The partners cannot change a principal's position by calling him a creditor. The fact lies back of language, and the relation is fixed by the fact.[2]

1. *A commission on profits is opposed to a share in them.* B, manufacturer, let C, merchant, a store and lumber yard, agreed to provide labor and material, for shovel handles and other implements, to be paid for by goods, at retail prices, out of store, which C should stock and carry on, and, for additional compensation for store and supplies, a commission of 50 p. c. on the profits of the business. B bought lumber, for working up implements, from A, who sued C for price.—Judgment for C. Dunham v. Rogers, 1 Barr. 255, Pa. (1845). Stocker v. Brockelbank, 15 Jur. 591; 3 Mac. & Gord., §59, n. j.

Share in a sum equal to profits. A employed B as superintendent in brush factory, giving him, in lieu of salary, "sum equal to 1-2 profits." B withheld certain brushes, notes and cash proceeds of sales. A brought detinue. Defence: Should have brought bill of account.—No partnership. Brockway v. Burnap, 16 Barb. 309, N. Y. (1853).

Employee, at salary measured by profits, not a partner. A, employed by B & Bro., at a salary to be measured by profits, brought injunction to restrain them from mortgaging and selling land bought with firm funds.—A had no standing to maintain bill, as he was but an employee. McMahon v. O'Donnell, 5 C. E. Gr. 306, N. J. (1869).

2. *Title to profits not disguised by calling it a claim.* B & C, about to put $10,000 in D's business, and take 1-3 profits, changed the plan, and lent D $10,000, each taking his note for $5,000, payable in 3 years,

and stipulating for a sum equal to 1-6 profits, as compensation for procuring loan. They also aided D in obtaining further funds for the business, but took no part in the management. A lent D $12,000, and sued B & C as partners.—Liable. Parker v. Canfield, 37 Conn. 251 (1870).

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§61.

Sharing both profit and loss does not make partners of the recipients, who do not take as proprietors.

A division of both profit and loss was the conclusive test of a partnership between the recipients.[1] The sharing of profits implied a corresponding burden of loss, but when the loss was expressly assumed, the partnership could not be explained away, and the liability being admitted, there was no object in denying the relation.

The error of arguing a partnership, however, from the word sharing, in its indiscriminate sense, extends to sharing losses. The agreement to share losses has no effect, unless the contractor is a proprietor.[2] Then it identifies him with the business.[3]

If the property element is disregarded, the identity of interest ceases to be a clue to explain the transactions of the parties, and their agreement to divide the losses would also cease to prove a partnership. The division might be an independent agreement, and not indicate that the parties meant to be co-principals and co-agents in the transaction.[4] The proof of partnership would be limited to the intention of the parties, and that would be a secret which they might have every interest to deny.

1. "An agreement to share profits and losses may be said to be the "type of a partnership contract. Whatever differences of opinion "there may be as to other matters, it admits of no doubt whatever "that persons engaged in any trade, business, or adventure, upon the "terms of sharing profits and losses arising therefrom, are partners "in that trade, business or adventure." 1 Lindley, Law of Partnership 19.

2. If not a principal, he is not a proprietor or partner. §57.

3. If the losses were not shared, the indicia of title to the property would not be complete, and the profit-sharer would not take by virtue of a property-right.

Sharing profits, and not losses, not partnership inter se. A owned patent. B advanced money to build machine, and stipulated for reimbursement and 1-4 receipts from working or sale of machine. He also bought 1-4 of patent right. On sale, each had refusal of the other's interest in patent. Neither could bind the other by contract. A sold machine, and kept the money. B sued him for advances and conversion. Defence: Partner could not sue co-partner for fraudulent removal of firm property.—No partnership *inter se*, because they shared nothing but the profits; B bore all the expenses. Cummings v. Mills, 1 Daly 520, N. Y. (1866).

4. Chaffaix v. Lafitte, §57, n. 3.

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§62.

Sharing the gross profits does not make the recipient a partner.

A division of gross profits may occur between co-owners who join in a sale, or between two persons who unite in a purchase and re-sale, where each carries independently the burden of his own purpart, or between the owner of the thing sold and one who contributes only services. A joint purchase at the Common law does not make a partnership, nor does a subsequent sale have that effect. On the re-sale, a division of the gross product is treated like a division of the article purchased. Each party to the transaction

bears his own expenses, and has no claim for contribution. The proceeds of the sale are substituted for the thing sold. The process, by itself, does not constitute a partnership, no matter how often it is repeated. In a partnership, on the other hand, each party is entitled to credit, in the settlement, for his contribution and expenses. Only the net result is divided.

If sharing the gross receipts did make the recipients partners, it would be on general principles, because the sharing identifies them as principals in the business. An analysis shows that they are not identified in interest. Gross profits, in the idiom of lawyers, are gross returns. Net profits are the excess of returns over advances; the expenses are deducted, and the product is divided. Sharing the gross returns is taking the benefit of the contribution; it may be capital stock, or it may be capitalized skill, without accounting for any part of it to reimburse the co-partner for losses or expenses. The share is independent of profits, and may be taken when there is a loss.[1] The sharing is not measured by the success of the business and the sharer's interest in it, but is a sum fixed by a standard apart from the business. Though the sum may come out of profits, if they are sufficient, it will, nevertheless, come out of somebody, though there be no profits. The fixed amount, which is independent of the success or failure of the business, betrays a stranger's interest, and not a principal's. A proprietor's share springs out of the business, and varies according to its vicissitudes. A principal who made no conribution himself, could never take his copartner's, and make gain out of his co-partner's loss and the failure of the business.

The exception under discussion affords a verification of the proposition, that sharing the profits makes a partnership between none but co-proprietors. The gross returns include profits, and should, unless the profit-sharing, which makes a partnership, was limited to proprietors, convert the taker into a partner, because he hopes to get the profits. This being so, he should be none the less a partner, because he bargains for an equivalent out of capital, although there should be no profits. On the other hand, however, the gross returns are inconsistent with a co-proprietor's interest in the business, because his share varies with its success or failure.

1. The captain of a barge, who received 2-3 of the advance in price at the market over the price at the mines, would not be a partner with the owner of colliery and boat (§59 n. *k*). The freight is put against the home price, and the captain's services against the owner's outlay. The owner pays his own expenses, and the captain includes his in the 2-3 enhancement. The cost of transportation might exceed the increase in price, or there might be no increase. Then the captain would not share profits. If the cost of transportation just equalled 2-3 of the enhancement, the captain would get no profits, while the owner would get his share in full. There is no sharing of the profits which are actually made in all and every event.

Quarrying for half proceeds of sale, not joint benefit. B, owner, agreed to quarry marble, deliver it on cars, and pay half cost of transportation to A's mill; A to build mill, manufacture and sell marble, and divide proceeds. B's credit failing, A paid claims against him, with his knowledge, and sued for reimbursement.—Recovered. Payments at request; no joint benefit or partnership, for B might gain while A lost. Flint v. Eureka Mfg. Co., 55 Vt. 669 (1881).

Sharer of gross returns not a partner. B C & D consolidated rival lines, and joined in running a single stage line in the White mountains. B & C furnished a coach and two six-horse teams, with drivers and other appointments, and D furnished an equal amount of stock. A sued for the price of corn sold to B & C. D's defence: Not a partner. They shared not the profits, but the gross receipts. Court charged that they were jointly liable for supplies.—Verdict for plaintiff set aside. D not a principal in the business of B & C. Eastman v. Clark, 53 N. H. 276 (1872).

The owner of a lighter and a lighterman were partners if they shared the profits, but master and servant if they shared the gross returns.[a] The lease of a ferry for 1-2 the gross receipts did not make the proprietor and lessee partners in

carrying on the ferry.[b] The expense of keeping up the lighter and running it might exceed the profits. Then it would be run at a loss, but the hirer would get his quota, which would come out of the owner, who had to pay for the expenses. The same would be true of the ferry rented to the ferryman. The gross receipts divided by the theatre-owner and the stage manager[c] are thus explained. The owner would get his rent, although the manager made no profits out of his management, and the manager would take his moiety, although the rent would not pay the expenses of the building. In either event, the one would make out of the other's loss.

a. Dry v. Boswell, §44, n. 3.

b. *Gross receipts.* A leased ferry to B for 1-2 gross receipts. C's horses were drowned through negligence of B's employee. C sued A as partner.—No partnership. Heimstreet v. Howland, 5 Denio 68, N. Y. (1847).

c. *Gross profits as rent not partnership.* B, owner of theatre, arranged with C that he should use the theatre, provide a troupe, select plays, and have exclusive control of the management: that B should pay for printing, advertising and lighting, and should supply door-keepers, scene shifters, supernumeraries and a band. B retained 1-2 the receipts taken at the door, as payment for the theatre, and C took the other half. B was sued as C's partner, by A's assignee, for infringing his stage right.—Not liable; he shared gross profits, which he took in lieu of rent. Lyon v. Knowles, 3 B. & S. 556 (1863).

The sailors who ship for a cruise on the lay plan, do not become partners in the undertaking.[d] They secure the bulk of the proceeds, but sharing the gross receipts does not associate them as a co-operative partnership.

d. *A lay voyage does not convert the sailors into partners.* A shipped as a sailor for a whaling voyage, and B, the captain, agreed to give him, for his services, 1-190 of the oil. A sued for his lay. B applied for non-suit.—Overruled. A received the proceeds as wages, and not as a partner. Wilkinson v. Frasier, 4 Esp. 182 (1805).

A carrier who provides the equipment and supplies for his section of a through line, is not a partner with connecting carrier, if he simply shares the gross receipts of the business.[e] But if there is any joint expense, as, for example, the payment of tolls out of the aggregate fares collected, then there is a sharing of net profits, and the carriers become

partners. The expenditures of each, in maintaining his section, is treated as a continuing contribution.[f]

e. Stage proprietors not liable for keep of a separate proprietor's horses used by them in running their stage-coach line. B, C & D, who owned a stage-coach, agreed to run it on a route and share the profits. Each supplied horses for a part of the course. A sued C & D for the price of hay ordered by B for his horses. Judge charged jury to find for plaintiff, because C & D were benefitted by keeping up B's stock for the joint service. Barton v. Hanson, 2 Camp. 97. But the instruction was overruled and a new trial ordered. 2 Taunt. 49 (1809).

Connecting lines; forwarding no partnership. A & B owned connecting lines. A agreed to forward freight and divide receipts according to schedule of rates. Last carrier to advance accrued charges, upon transfer to him, and collect whole bill on delivery. C made through shipment. B, as last carrier, sued him for total freight. C alleged partnership, and set up non-joinder of A, in order to plead set-off.—Recovered. No set-off against A. He was not a partner, because only part of earnings or through freights were pooled, and parties remained independent as to their separate lines. C was liable to B, because he had accepted goods from B under bill of lading which made total charges payable to B. Merrick v. Gordon, 20 N. Y. 93 (1859).

Connecting lines. Connecting lines, A, B and C, from N. Y. to San Francisco, via Panama. N. Y. agent sold separate tickets for each line, and accounted to each line separately; although advertisement of trip was joint, and announced merely through fare. Each line bore its own expenses and took its own profits. Line C was prevented, by wreck of steamer, from transporting plaintiff from Isthmus to San Francisco. He sued C for return of whole fare.—Because no partnership, recovered only fare from Isthmus to San Francisco. Briggs v. Vanderbilt, 19 Barb. 222, N. Y. (1855).

N. Y. agent of connecting lines sold through coupon tickets to Montreal. Traveller kept valise with him in passing over line A, and checked it on line B to destination. He sued line A for loss of valise. —No partnership, because lines independent, though connecting. Straiton v. N. Y. & N. H. R. R., 2 E. D. Smith 184 (1853).

Agreement between railroad company and proprietor of canal to forward goods and passengers. Fares and freights to be shared, in proportion to lengths of respective lines. Offices maintained, at joint expense, at *termini*. Plea of partnership to action of assumpsit for share of receipts in hands of defendant.—No partnership. Mohawk & Hudson R. R. v. Niles, 3 Hill 162, N. Y. (1842).

Connecting railroads which share through freight and untraced losses, are not partners. A shipped horses by railroad B, which gave him receipt for through freight. He sued connecting railroad C for injury. B & C, by contract, each in the joint business bore his own losses, unless they could not be traced, and then in proportion to his share of the through freight. Contract excluded.—Verdict for C. Law made each liable for its own negligence, in spite of B's contract for through transportation. Contract did not change law, or enure to A's benefit, but merely adjusted the losses between B & C. Aigen v. Boston & Me. R. R., 132 Mass. 423 (1882).

Gross returns. A & B worked connecting coach-lines. Each worked his own line, and sold tickets over total route. Fares divided in proportion to length of respective lines. A sued B in assumpsit for balance due. Defence: Partner must bring account.—No part-

nership, because no sharing of profits and loss; merely division of gross returns. Pattison v. Blanchard, 5 N. Y. 186 (1851).

f. *Connecting lines.* A, B & C ran connecting coach lines, each retaining all the profits and bearing all the losses of his own section. When necessary, an extra coach was run through on joint account. A statement of account, made by a common agent of A and B, showed that B had received more than his proportion of fares collected. A brought assumpsit against him for excess.—Suit maintained, because no partnership, except for extra coach. Wetmore v. Baker, 9 Johns. 307, N. Y. (1812). Approved in Champion v. Bostwick, 18 Wend. 182, (1837).

Connecting lines: and earnings pooled. A & B owned connecting stage-coach lines. They pooled all fares from through and way passengers, paid all tolls out of this fund, and divided the residue between them, in proportion to lengths of respective lines. B's coach ran into C's carriage, and threw C out. He sued A & B, as partners. A denied partnership.—A liable as partner. The use of each partner's stock is a sufficient capital. By the agreement, the tolls were the only joint expense. Sharing aggregate fares, less tolls, is sharing net profits. Champion v. Bostwick, 11 Wend. 571, s. c. in error; 18 Wend. 175 (1837).

Co-operation in running a line charges each member of the association for the entire route. B, C & D, teamsters, who had been partners for the entire route, divided the course into sections, and each hired the wagon, provided everything necessary to run it over his section, and shared the profits. A sued B & C for damages done by a driver employed by D.—Liable. Waland v. Elkins, 1 Stark. 272; s. c. Noland v. Olbins, 13 Petersdorf 106 (1816).

Connecting lines with common agent. A common agent of connecting lines contracted to transport goods from point on line A to point on line B. Goods lost on line B. Owner sued both jointly. Proprietor of line A claimed to be forwarders only.—Jointly liable on contract, though they shared neither profit nor loss. Slocum v. Fairchild, 7 Hill 292, N. Y. (1843).

If the expense of a vehicle is divided, and a rate paid for carrying the mail, with a sharing of profit and loss on other matter, the sharing takes the lead, and fixes a partnership between the contractors, although the rate might pay or be a pure loss.[g] The identification in part, indicates a co-ordination in all.

g. *Profits not a wage-fund.* A agreed to pay B £18 for a cart, and to carry the mail for £9 a mile per annum. They shared the profit and loss of parcel carriage and the expense of keeping cart in repair. On a separation, A sued B for his £9 a mile, and for his share of profits. Defence: A was a partner.—No recovery. Sharing the profit and loss makes a partnership, and is not a measure of wages. Green v. Beasley, 2 Bing. 108, N. C. (1835).

§63.

The commission on sales is like a share of the gross returns.

The commission is payable out of the price, whether the sale was made at a profit or at a loss. Although paid out of profits, if any were made by the sale, the commission is inconsistent with equality between the owner and salesman in conducting the business for themselves as principals.[1] If the commission is given to factors or brokers, they have no stake in the business, but an interest which might be antagonistic to its success.[2] If the owner does not limit the price, the commission might be paid by him out of his capital.

ULPIAN puts the case of an owner who authorized another to sell a set of pearls at a fixed price, and gives him all he can make if he sells above the limit.[3] Is the seller a partner with the owner? POTHIER finds the riddle insoluble, except by a resort to the parties' intention, which may make the transaction a partnership, or may make it a commission.[4]

The intention, which would constitute the parties partners at the Roman law, must appear in the answer to the question: Did the owner intend to make the seller at once a co-owner with himself in the pearls? If he did so intend, a partnership was created, because the *societas* of the Roman law was nothing but a co-ownership, arising through contract. The pivotal point, upon which the whole matter turned, was the responsibility of the parties for a possible loss of the pearls. If partners, they must share the loss in proportion to the respective values of their contributions, and as there is no fixed estimate put upon the contribution of the seller, and his share of the price was to be determined upon a sliding scale, the law would apportion the loss equally, and compel him to reimburse the original owner for one-half the value. Every partnership, at the Roman law. implies a contribution. To make the seller a partner,

therefore, it was necessary that he should have agreed to render services, or defray expenses, which the owner should accept as an equivalent for an interest in the pearls. STORY, with this idea in mind, adopts DUVERGIER'S answer to POTHIER: The seller makes no contribution, and therefore is not a partner.[5] As, however, his skill and services may constitute a contribution, the answer does not settle the controversy. They seem to have supposed that the seller must make some material contribution, in money or property. The expenses, if any, would be a material contribution, but do they, if advanced by the seller to create a market for the pearls, lead to the solution of the problem? Not necessarily. If contributed to the firm, they must be deducted from the price, and returned to the seller before a division of the profits. Such a course, however, is excluded by the statement. By the case stated, if the seller is put to any charge for expenses, it must be at his own risk, and be a part of his stake in the venture. This stake comprises his skill, his services, and the expenses, and may be advanced by him under a contract of agency, in view of the commission which he expects to earn. An agreement to reimburse the expenses would, therefore, determine the question and establish a partnership. It is certain that the jeweller gave his services and skill, but it does not appear that he made any material outlay, for there may have been no expenses. Expenses, if shown, would have created a presumption of partnership, unless it was proved that they were not to be reimbursed. This conclusion is negatived by the statement of the case. The price fixed by the owner excludes any liability on his part for expenses. The right to reimbursement for skill and services, however, depends upon the question of partnership. They cannot be reimbursed in form; but, on the hypothesis of a partnership, if the seller exhausted his resources, and there was no market for the pearls, the parties would divide them. On the theory of agency, however, the owner would retake the pearls. The relation of partnership would have secured to the jeweler a reimburse-

ment for his skill and services, by investing him with property in the pearls. The relation of agency would give the jeweler no reimbursement for his skill and services. On the other hand, skill and services being the proper subject-matter of a contribution, although immaterial, had there been nothing else in the case, would have created a presumption of partnership, which could be rebutted only by proof of a contrary intention. The inference to be drawn from the limit in price fixed for a sale of the pearls is, that the owner did not intend to part with any portion of his property in the pearls, and thereby reimburse the seller for his skill and services. The skill, services and expenses, therefore, stand upon the same footing.

At the Common law, the question of partnership turns upon the rights of third persons, rather than upon the relation of the partners to each other. The ultimate ownership of the pearls would, therefore, not be a controlling factor. For upon dissolution the owner is always entitled to reclaim his material capital, or so much of it as the firm assets will replace without reimbursing the skill and services of a co-partner who made no material contribution. The case would be determined by the position which the parties assumed towards third persons in the disposition of the pearls. The liability of the original owner to strangers upon the contract of the seller, is the important consideration. Such a liability was, under all circumstances, excluded at the Roman law, because by its rules no one was bound by any contract, except the nominal parties to it. But with us, the owner would be liable in any event, and the question, whether there is a technical partnership, or not, loses its importance. If it appeared that the parties intended to constitute themselves co-owners temporarily, and for the purposes of the transaction, so that all expenses would be charged to a joint account, and only net profits divided, a partnership would arise; owner and seller would be liable, as co-principals. On the other hand, if no such partnership was intended, and the case stated, as has been

remarked, seems to exclude such an intention; nevertheless, upon the assumption of an agency, the same measure of liability prevails. The owner would be responsible, as an undisclosed principal, upon the contract of sale, which formed the purpose and substance of the agency, though he would not be bound on any contract respecting the expenses which the agent had agreed to defray. The agent, too, would be responsible on the contract of sale, as the nominal promissor. The stranger, therefore, holds both, and may sue them successively, till satisfaction is obtained. There is no reason, except one of procedure, why he might not sue both in a single action. It is said that they cannot be sued together because they made no joint contract with the stranger. They are two principals, but not co-principals. This is an instance where the phantom of a joint contract still controls our practice, although the courts have at times declared that the notion has ceased to be a part of our law.[6]

1. *Commission on sales no partnership.* B, part owner of mine, had excise licenses and kept a store in his own name for miners' supplies. He got C to take the business, buy goods in his own name, and allow him 5 p. c. of sales to miners. C opened an account with A, a bank. A's assignee in bankruptcy sued B for amount overdrawn by C. Holding out and sharing profit and loss negatived as facts by jury. Verdict for B.—New trial refused, because percentage a commission on sales effected through B's influence over his workmen. Pott v. Eyton, 3 C. B. 32 (1846).

2. *Commission on sale gives factor no interest which disqualifies him as witness to prove contract.* A sued B for price of wheat. C received 1 shilling a pound for making sale. B objected to C as witness to prove contract, on ground of interest.—Competent, because not a partner, with an interest in the price, but merely a claim against B. Dixon v. Cooper, 3 Wilson 40 (1768).

Broker's commission, all above a given sum, does not disqualify him. A sued B for price of merchandise. C was broker, and had all proceeds over a certain sum for making the sale. B objected to C as a witness to prove the contract, on the ground of interest.—Competent, because no interest, as a partner, in goods. Benjamin v. Porteus, 2 H. Bl. 590 (1796).

Percentage on gross sales no partnership. A sold good-will of business to firm, for 1 p. c. on gross sales. He also lent firm $100,000 at 7 p. c. Creditor of firm sued A as partner.—Not liable, for percentage on sales no partnership. Loan did not change the relation. Gibson v. Stone, 43 Barb. 285 (1865).

3. "Si margarita tibi vendenda dedero ut, si ea decem vendidisses, "redderes mihi decem, si pluris, quod excedit tu haberes, mihi

"videtur, si animo, contrahendae societatis id actum sit, pro socio "esse actionem, si minus praescriptis verbis." D. 17, 2, 44.

4. Du contract de société, ch. I, §III, 13 6 Oeuvres de Pothier 447–8, Paris, 1835.
"Si contrahentes animum habuerunt lucri in commune faciendi, "societas est, in qua alter rem (id est, margaritam), alter operam et "industriam in his circumferendis et vendendis confert. Quod si "hunc animum non habuerunt, puta dominus margaritae, qui potuis-"set ipse eam commode vendere tanti aut etiam pluris, margaritam "suam (tibi ut benefaceret) tibi vendendam dedit ea lege: hoc casu "societas non est; sed contractus innominatus ex quo nascitur actio "praescriptis verbis." Pothier, 6 Pandects 448.

5. STORY on Partnership, §51.

6. Miller v. Reed, 3 Casey 244, Pa. (1856).

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§64.

The lender is not turned into a partner by partaking of the profits, for a loan, being once established, is the opposite of ownership.

Is the distinction between a lender and a partner a question simply of degree? The lender may measure his interest by a quota of the profits, or he may take a share of profits in lieu of interest. How is he distinguished from a partner? A lender might be induced, by solicitude for his investment, to watch and see how the business was conducted. Unless it should be successfully managed, no equivalent would be received for the use of his money, and the loan might be put in jeopardy. Would the supervision which he gave to the management of the business, in order to protect his investment, convert him into a partner? The amount risked in the business might be equal to a partner's share, or might exceed it. The motive of self-interest would be as strong to make him control the business as the motive which impels a partner. The difference is not to be found in an analysis of the

motives. It is in the action which they call forth, that furnishes the test of the relation, by disclosing the partner's object. The lender surrenders his property to the debtor, and trusts to his character as security for the loan. The precautions which he takes to see that the debtor manages his business with success, are taken as means of information, to enable the creditor to act promptly, if necessary; they are not acts of control over the debtor in his business, nor an interference with his management. The partner, on the contrary, relies upon himself, and keeps his property within his control. He does not part, absolutely, with his title, or trust to anybody else for its recovery. The question, therefore, turns upon the destination and control of the fund. If the would-be lender stipulates that the sum lent shall be retained in the business, and can enjoin the borrowers from withdrawing it, he is a partner.[1] On the other hand, although the lender receives a portion of the profits from a particular business as interest, he has no right to insist that the sum lent shall remain in the business, in order that the profits may be earned.[2]

Statutes have been passed, affirming this distinction between a loan and a partnership, and for the purpose of relieving a lender from all liability to third persons, by reason of his sharing the profits.[3] The courts have held these provisions to be merely declaratory of the Common law,[4] and have, notwithstanding the statutes, charged the would-be lender as a partner, wherever it appeared that he had reserved a right to control the destination of the fund. On the other hand, these enactments have altered the lender's position for the worse, by postponing him to all other firm creditors.

1. Pooley v. Driver, §50, n. 3.

2. *Sharing profits does not make lender a partner.* Firm B C & D, to keep up a factory, which they eventually meant to take, advanced the capital, and discounted its paper on orders approved by them for manufactured goods, taking a chattel mortgage to secure the advances. They stipulated for 1-4 the profits. A sued them for merchandise supplied to factory.—Judgment for defendants. They were merely financial agents. Cassidy v. Hall, 97 N. Y. 159 (1884); McLewee v. Hall, 103 N. Y. 639 (1886).

Loan for part profits not partnership. By bond, B agreed to lend C, agent of a corporation, $5,000 for one year, and to endorse for him to the extent of $2,000, if B thought C's business required additional capital, for 10 p. c. net profits and 2 p. c. for each $1,000 above $5,000. C agreed to conduct business to the best advantage, and to keep accounts, which should be open to B's inspection. A supplied materials for works at C's corporation, and brought assumpsit for price against B & C.—Judgment for defendants. Loan to C, and assumpsit would not lie. Contract for court. Boston & Col. Smelting Co. v. Smith, 13 R. I. 27 (1883).

This constituent of partnership is some times ignored.

Half profits for loan, which is to be repaid, are taken as compensation for the debt. Bond executed by B in 1870 to A, for $9,491.77 already invested in merchandise during 1866, for 1-2 profits made by trading with it from 1866. B died in 1877. A recovered judgment in Probate Court, against B's administrator, for principal and 1-2 profits, to wit., $19,885.60, and payments were made on account. Administrator d. b. n. subsequently moved to quash judgment, on ground that A was partner, and Probate Court no jurisdiction.—Judgment sustained. The transaction not necessarily partnership. Right to the return of principal and 1-2 profits implied account and inspection of books, but not right to control or be consulted, *unless B changed destination of fund.* Culley v. Edwards, 44 Ark. 423 (1884).

3. 28 & 29 Vict. c. 86. Statute of Pa., 6 April, 1870, 1 P. L. 56.

4. *Statute authorizing loan without making lender partner with borrower declaratory of the Common law.* A sued B as C's partner. B's affidavit of defence: Agreed to furnish C funds necessary for his business, and receive, after repayment of advances, a share of the profits; but never advanced anything or received any profits. Agreement rescinded. Some of items in A's bill furnished before execution of contract, and the others after its recission.—Affidavit sufficient. Hart v. Kelly, 2 Norris 286 (1877).

The point did not arise for decision. The defendant agreed to lend and, besides repayment, to receive a share of the profits. But some of the debts sued for were contracted before the contract was executed, and were never made with the defendant, and some were incurred after the contract was rescinded. He was not liable for the first, as he did not contract them, nor were they contracted for him; he was not liable for the last, because he had ceased to be a partner when they were contracted, and a dormant partner is not liable for what is contracted after he withdraws.

Although a stipulation that the advance shall remain in the business, makes the would-be lender a partner, an agreement, on the other hand, to look only to the firm assets for payment, has no such effect. It is a dogma of the common law that there is no such thing as a qualified liability. There must be a debtor who shall be liable, absolutely, upon his contract. Every debtor is responsible to the full extent of his resources, and, though he might charge a portion of his property, by way of preference, he could not limit his liability to any particular part of his estate. Nevertheless, this principle has been waived, and the courts, in anomalous cases, have enforced a creditor's agreement to release the partners from any personal obligation for the debt, except so far as it could be satisfied out of the firm assets.[a] The Hindu Rajah's case affords a contrast to the foregoing. The creditor held the debtors in a vice, and they could do nothing without his permission; but the extremity of the business required all his pressure to recover a loan which had become desperate. The business was sequestrated, as if on execution, and for the single purpose of making the debt. He did not receive the profits as a proprietor, although he absorbed them, on account of the principal and interest of his debt. The debt arose, originally, from an undoubted loan, and the Rajah assumed control, not to secure the retention of his advance in the business, but to save it from the wreck.[b]

a. *Throwing good money after bad not partnership.* B, a creditor of C & D, agreed to go into a building operatiou with them, to advance part of the money and materials, and to look for payment of his existing debt and of his advances solely to the profits of the operation. After payment of B's debt and advances, all profits belonged to C & D. A supplied lumber, and sued B as a partner.—Not liable, because his object was payment, and advances but a means to collect prior debt. Making payment contingent upon profits does not extinguish the debt, which fastens on the profits as a fund for payment, though the debtors are released. Kilshaw v. Jukes, 3 B. & S. 847; 32 L. J. Q. B. 217; 9 Jurist N. S. 1231 (1863).

b. *Control of business to secure a debt does not establish partnership.* Hindu Rajah made advances to B & Co., Calcutta shipping merchants, upon condition that they should not order or receive consignments, ship or sell goods, withdraw money, transact or alter business, except by his consent. Shipping documents were at his

disposal, and could not be sold or pledged without his consent. All proceeds to be paid him on account of his debt, and 20 p. c. of profits as commission, besides 12 p. c. interest on his advances. A, who dealt with B & Co., sued Rajah as a partner.—Not liable, because he had no initiative, and his intention to secure a debt. Mollwo v. Court of Wards, L. R. 4 P. C. 419 (1872).

The amount of interest, or profits, does not necessarily make the lender a partner. Should he stipulate for 20 per cent. interest, or 25 per cent. if profits, the 1-5 and a possible 1-4 might show the desperation of the borrower, but no co-operation by the lender.[c]

c. *Interest a sum equal to 1-5 profits.* B lent C $20,000 for two years, who agreed to pay $4,000 a year interest, and if that sum did not equal 1-4 profits, to increase it to that amount. A having sold merchandise to C, who absconded, sued B for the price.—Judgment for B. Lord v. Proctor, 7 Phila. 630 (1870).

If the profits are in addition to interest, they may be additional compensation for the use of the money, and if not coupled with control of the business, do not establish a partnership.[d]

d. *Loan for interest and a share of building operation not a partnership.* B lent C, land owner, $50,000, secured by mortgage on the land, for a building operation, and stipulated for interest and 1-2 profits. A, who furnished materials for building, sued B.—Judgment for B. Not a partner. Curry v. Fowler, 87 N. Y. 33 (1881).

An agreement to let the lender take possession, sell the goods, and share the profits, after reimbursing the loan, would not make him a partner. The advance closed the transaction, and left no room for implied authority.[e] The lender held the property as security.

e. *Share in profits, given for money advanced for cash purchase, don't pledge lender's credit as partner.* B induced C to lend $2,500, to pay for two carloads of hogs, and agreed to let C take possession, as security, ship them to Pittsburgh, and, after reimbursing himself out of the proceeds of a sale, to take one-half of the net profits. Afterwards, B bought of A 17 hogs on his own credit, to make up the two carloads, without C's knowledge. B, in pursuance of the agreement, repaid C in full, as the hogs did not bring enough to repay the advance. A sued B & C, as partners. C's defence: No partnership.—Judgment for C. Advance for a cash purchase, and not for use in a continuous business, which would imply transactions on credit. Harvey v. Childs, 28 Ohio St. 319 (1876).

A lender may secure himself, as an annuitant, who is paid out of profits, and not be a partner. He takes no part in the business. He might receive an annuity, or profits, in return

for a guarantee of capital requisite to meet insurance liabilities, and be a trustee to impound the receipts until the annuity and family expenditures were provided for, and a reserve accumulated, without being a partner. The application of the receipts (which were profits, as the brokers paid over only the balance after the losses were deducted) to payment was in the debtor's interest, and on his account.[f]

f. Annuity, or 1-4 profits, no partnership. B advanced £5,000 to set up his son, C, in the insurance business. C agreed to pay B £500 annuity, or 1-4 the profits, if it appeared that average 1-4 during 3 years exceeded £500. C subsequently, by marriage settlement, assigned the proceeds of his business to B & D, whom he made trustees to pay his annuity, and to pay the balance for trusts declared by C, but B was not to be C's partner. A sued B for a loss under a policy issued by C.—Not liable, because no intention to be partners. Bullen v. Sharp, L. R. 1 C. P. 86 (1866).

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§65.

The amount of interest, or profits, does not determine the question of partnership.

The lender may take a quarter, a half, or any proportion, of the profits, without affecting his status. Should he stipulate for a share of the profits, equal to 20 or 25 per cent. interest, or for interest which would equal 25 per cent. of the profits, the bargain would show the desperation of the borrower, but no co-operation by the lender. The interest, in either event, would not be usurious, because, although it might exceed the legal rate, if the business was successful, on the other hand, if the business was unsuccessful, no interest at all would be paid. The contingency, which affects the payment of interest, excludes the question of usury.

If a share of the profits is in addition to legal interest, the loan is usurious; but inasmuch as the profits

are additional compensation for the use of money, they do not, although usurious, establish a partnership, when not coupled with control of the business.[1]

1. *No account for share of profits if usurious.* A advanced B $16,500, partly on mortgage at 7 p. c. and 1-4 profits of his bottling establishment. A asked for account and receiver, as a partner. Decision below: No partnership, but a loan, and A entitled to an account.—Reversed. If not a partner, loan usurious, and account will not lie. B not estopped by failure to plead usury, or to object to evidence of; because competent under the issue, which was partnership, and not a loan. Arnold v. Angell, 62 N. Y. 508 (1875).

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§66.

The loan does not become a partnership because the interest is usurious.

Partnership should not be confounded with usury. In cases where the lender stipulated for such an interest in profits as made his loan usurious, for example, where the lender took a share of profits, in addition to the legal rate of interest, the question: What constitutes a partnership? was at first complicated with usury. Lord MANSFIELD made partnership an asylum of refuge for a usurer, who might elect it to escape punishment for his crime. At first, his lordship thought the risk of bankruptcy would inflict a greater evil than the penalty which the law imposed for usury, and he, therefore, permitted the usurer to elect a partnership as the worst punishment.[1] Subsequently, he took away the election, and inflicted partnership absolutely as a penalty for usury. The adjudged partner was not permitted to confess, and take advantage of his own crime, by pleading usury, if its penalties were less than the liabilities of partnership.[2]

BLACKSTONE rejected this view, and made the distinction depend upon the form of the transaction. He said the excess of interest was a fixed rate, which resembled a debt due from another, and could not be identical with profits, which were variable in amount, and were the immediate property of the partaker.[3] The difference was between owing and owning, or the distinction of property. Nevertheless, the form of a loan does not exclude proof of a partnership, even between the partners (§50).

It has been held that, although the contract is usurious and, on that account, void between the parties, yet third persons, whose rights are paramount, may hold the parties as partners.[4] But this decision is based on the assumption that partaking of the profits, in any form, makes the recipient a partner, without reference to proprietorship. Properly considered, third persons acquire no rights against an individual on the ground of his participation in the profits, unless he receives them as a proprietor or partner (§57). When, therefore, it is admitted that, as between the original parties, the contract is in legal effect a loan, and, on that account, void for usury, the basis of a liability to third persons is wanting.

The decision of Morse v. Wilson is an application of the true principle.[5] The lender in that case stipulated for a share of the profits, in addition to the legal rate of interest. In an action to recover the debt, he sought to meet the charge of usury, by alleging that upon the legal effect of the transaction his investment was really in jeopardy, because, as a partaker of profits, he was liable to the creditors of the firm. The court, however, declared that as the advance was to be repaid

in any event, the insolvency of the borrower was the only danger incurred, a risk which every lender takes. A personal liability of the lender to third persons would in no way affect the transaction, which remains a loan, because the borrower and his surety were bound without regard to the success or failure of the business to return the advance, which, by reason of their responsibility, was not technically in jeopardy. The risk which relieves from the penalty of usury affects the investment itself, and makes the right to its recovery contingent.[6]

1. *Profits, though in lieu of interest, are not usurious, because counterbalanced by losses.* A covenanted to lend B £100 for 4 years, without interest, if he would board A's daughter, C, for £10 a year, and take her into partnership with his wife, giving her an equal share of the profits and losses. If C died, B agreed to repay principal and interest to A. Defence to his suit on bond: Covenant usurious.—Risk of C's bankruptcy equivalent to the penalty for usury. Morriset v. King, 2 Bur. 891 (1759). NOTE.—Lord MANSFIELD, afterwards, wouldn't let lender deny partnership, because he would criminate himself, as a usurer; but here he considered bankruptcy worse than usury, and a sufficient sanction.

2. *Taking usurious interest in trade renders the taker liable as a partner.* B bought out his partner, C, and gave him a bond for £2,485, amount of his contribution, with interest at 5 p. c., and agreed to pay him, in addition, £200 a year for six years, in lieu of profits. C had the right to inspect B's books. B became bankrupt, and A sued C for a debt incurred by B in the business.—Liable, because contract usurious, and C could not take advantage of his guilt in order to escape liability as a partner. Bloxam v. Pell, 2 Wm. Bl. 999 (1775).

3. Grace v. Smith, §55, n. 1.

4. Sheridan v. Medera, §57, n. 4.

5. *Liability to third persons, as a partner, no protection against usury.* A lent B £2,000, for 5 p. c. interest and part of the profits of B's share in firm of B & Co. Defence to action of debt by A against B's surety: Usury. Answer: A, though not liable for losses between himself and B & Co., would be liable to third persons; therefore, his principal was in jeopardy, and profits equalized his risk.—Notwithstanding a possible liability to third persons, contract is a loan, and usurious. Morse v. Wilson, 4 Term. 353 (1791).

6. *Loan for interest and profits out of proceeds pledged, not partnership.* B advanced C & D, manufacturers, $50 each, secured on 200 lumber wagons, for interest and 1-4 profits out of sales. A sued B for rent of premises occupied by C & D.—Not liable. Profits measure of compensation for loan. Richardson v. Hughitt, 76 N. Y. 55 (1879).

B advanced C $2,500 to start business, and took chattel mortgage for loan, 1-2 receipts for compensation, but if not equal to interest C made up difference. A sued B for goods supplied to C.—Not partner. Loan payable in any event. Eager v. Crawford, 76 N. Y. 97 (1879).

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§67.

The inference will be against a partnership where the facts are consistent with any other relation.

The reason for this inclination arises from the unwillingness of the courts to impose the unlimited liability of a partner, if any other legal relation will adequately interpret the facts.

Co-ownership.

The natural inference from co-ownership, viz., a passive tenancy in common is not overcome by using the property in trade, unless it is made a part of the active capital of the firm. Fixed capital may remain the property of the partners, as tenants in common, and only the use be contributed to the firm.[1] It is in accordance with this theory of the Common law that the co-owners of a ship are tenants in common. At first, the leaning was against letting a ship form part of a firm's stock. But now, the ship, if fitted out on joint account, and employed in the business, becomes partnership stock,[2] whether equipped for one or more voyages[3] or for a continuous business.[4] A settlement after each shipment does not affect the question of partnership in the ship.[5]

1. *Co-ownership of a vessel, and partnership in a shipping adventure.* A & B, merchants, each having a separate business. They had, at various times, and in various vessels, undertaken shipping adventures on joint account. They owned the "Phœnix" in common. They

equipped, freighted and sent her off on a voyage. Before her return to port, B failed, and made an assignment. A then sent word to master to sell ship and cargo in a foreign port, and, with the proceeds, to buy another ship, in A's name, and a cargo, to be shipped to him as consignee. This was done. The assignees of B brought a bill for an account for B's half in the proceeds of the Phœnix. A sought to retain, for general balance of account on previous adventures, and for sums advanced beyond his share in the equipment of the Phœnix.—Not partners in the vessel. Evidence showed only a partnership in the cargo and equipment. For this balance A had a lien on the proceeds, but not for a general balance. He must pay out to the assignees, B's share in the vessel, after deducting the advances on the equipment. Mumford v. Nicholl, 20 Johns. 611, N. Y. (1822).

2. *Partnership in a vessel.* A, B, and several others, had a ship built, and ran her on joint account. A owned 1-4, and was agent. B was master. A & B disagreed, and a majority displaced A from the position of agent. A asked for an account, a receiver, and an injunction against his associates, to prevent them from continuing to run the craft. Court below allowed them to give security, and refused every prayer but the one for an account.—It was sufficient, if defendants gave security. Had they been tenants in common, injunction would have been granted. Dunham v. Jarvis, 8 Barb. 88, N. Y. (1854).

3. *Co-owners of a ship, though tenants in common of the vessel, are partners in the earnings of a voyage.* A, *et al.*, co-owners to the extent of a three-eighths share of the brig "Crimea," sued for $628.46, their portion of the freight of a voyage. Defence: 1, Set-off of an equal amount for a claim, which, though invalid, the master had allowed; 2, Non-joinder of co-owners.—Judgment for A *et al.* Plaintiffs, as partners, could maintain suit under the Code, as non-joinder of co-partners had not been pleaded in abatement. Master not agent as to past transactions, and might have consulted his employers. Merritt v. Walsh, 5 Tiffany 685 (1865).

4. *Co-owners of ship became partners by continuous business comprising a series of voyages.* B owned 1-2 and C & D each 1-4 of a ship. They agreed to run her and divide the net earnings in proportion to the shares. B assigned his interest in present voyage to A, who sued C & D. Defence: A's profits counterbalanced by losses on previous voyages.—Judgment for C & D. Co-owners of ship became partners by a continuous business, comprising a series of voyages. Williams v. Lawrence, 47 N. Y. 462 (1872).

5. *Settlements after each shipment not inconsistent with partnership.* Agreement by A & Co., in Calcutta, to share profit and loss upon shipments made to B & Co., in N. Y. Settlement after each shipment. B & Co. assigned for creditors, including certain goods shipped by A & Co. A & Co. claimed account and the balance. Defence: Shipments separate ventures.—Settlements did not break the continuity of partnership transactions. Eldridge v. Froost. 6 Rob. 518, N. Y. (1866).

The same principles apply to co-ownership in a patent.[6]

6. *Co-owner of patent not partners in works constructed under the patent.* B & C were interested in a patent for pile-covering, and A,

employed by B on docks built with the patent, sued B & C. C's defence: Not a partner.—Joint interest in patent did not create partnership without a share in profit and loss of building the docks. Boeklen v. Hardenburgh, 5 J. & Sp. 110, N. Y. (1874).

The owners of a race-horse, who kept and trained him, dividing the expenses and winnings between them, were not partners. Holding in common answered all the purposes, without resorting to a partship.[7]

7. *Co-owners of a horse.* A & B, owners of a race-horse, agreed that they should keep and train him, and that the expenses and winnings should be divided equally between them. A sued B for half the expenses.—Recovered, because co-owners, whether partners or not. French v. Styring, 2 C. B. N. S. 357 (1857).

In the cases discussed, the partnership in the stock was denied, because co-ownership afforded a sufficient explanation of the facts. The Pandects contain a case in which the partnership in the stock was denied, on the ground that the parties were not co-owners. ULPIAN quotes this case for CELSUS' opinion: "Cum "tres equos haberes et ego unum, societatem coimus, "ut accepto equo meo quadrigam venderes et ex pretio "quartam mihi redderes. Si igitur ante venditionem "equus meus mortuus sit, non putare se Celsus ait "societatem manere nec ex pretio equorum tuorum "partem deberi: non enim habendae quadrigae, sed "vendendae coitam societatem. Ceterum si id actum "dicatur, ut quadriga fieret eaque communicaretur "tuque in ea tres partes haberes, ego quartam, non "dubie adhuc socii sumus."[8] The decision is a consequence of the Roman conception of partnership, to wit., acquisition of co-ownership by contract. They did not intend to become co-owners of the horses, but did intend to be co-owners of the price. The partnership was, therefore, confined to the sale.

8. D. 17, 2, 58.

Sale.

A sale may be the object which they desire to effect. The owner of cotton, the owner of a ship and the consignee, co-operated to effect a sale on joint account, and shared the proceeds in quotas only as a mode of repaying the price advanced on the cotton.[9] The farmers who supplied milk to a cheese factory, and shared the profits in proportion to the milk which they contributed, were not partners.[10] They sold the raw product, and were paid out of the proceeds of the manufactured article. The farmers took no part in managing the factory, which was conducted wholly by the cheese-maker. They were not principals, or even agents, in the business.

9. *Joint owners.* A owned cotton, B a ship, and C's correspondent would sell, if made consignee. C advanced to A 1-2 price of cotton, at port of shipment, A to remain owner of 1-2, B and C each to take 1-4. Return to be made to C; loss upon advance made by C, who sued A in assumpsit for contribution.—Recovered: No partnership; transaction a sale on joint account, with peculiar method of repaying advance on A's share. Peltier v. Sewall, 12 Wend. 386 (1834).

10. *Sharing manufactured product in proportion to raw material furnished, not partnership.* B, and other farmers, delivered milk to cheese factory. Each was credited with amount of his milk, and all was manufactured together, and the factory sold the cheese. Each farmer was charged with his share of expenses, and received his share of proceeds, which was in proportion to the milk he furnished. A sold B's interest in the cheese under an execution against him.—Set aside. B not a partner, and had no such interest as could be seized and sold on a *fi. fa.* Butterfield v. Lathrop, 21 Smith 225, Pa. (1872).

These cases illustrate the distinction between the Common law and the Roman law on the question of a partnership in selling. At the Roman law, there might be a partnership in selling, although the parties were not co-owners of the stock, as appears from the case put by CELSUS, *supra*, for the parties would, nevertheless, be co-owners of the price, when obtained. The Common law, on the other hand, permits no part-

nership in selling, without a previous buying on joint account.

Bailment.

The object of the parties may be a bailment. The mode of compensation, by a share of the profits, does not alter the bailee's position, or give him any title to the merchandise held by him, but it remains the property of the bailor, and is subject to execution by his creditors.[11]

11. *A sharing in the profits a substitute for bailee's lien.* By agreement, A bought hides and delivered them to B for tanning. B returned them to A for sale. The proceeds, after paying freight, 6 1-2 cents a pound to B for tanning, 7 1-4 p. c. to A for buying hides and selling leather, were equally divided. Losses were to be borne equally. A replevied tanned leather in B's hands. Defence: B entitled to possession, as partner and co-tenant in common.—Judgment for A. Hides and leather his separate property, though a partner in the business. B's share in the profits was in lieu of his lien as bailee. Moore v. Huntington, 7 Hun 425 (1876).

Buying wheat for manufacture, with payment and commission out of sales of the flour, don't make buyer partner with manufacturer. Under agreement, A furnished wheat, B & Co. milled it, sold the flour, and delivered proceeds to A. He retained cost of wheat, 2 1-2 p. c. commission on price of flour sold, and returned residue to B & Co. They, as members of a dissolved firm, owed C, who levied on the wheat. A brought replevin against sheriff.—Judgment for plaintiff. Wheat belonged to A, and B & Co. were his bailees. Johnson v. Miller, 16 Ohio 431 (1847).

Factorship.

The business may be localized, and come nearer a *del credere* factorship than a partnership. Sharing the profits and losses of consignments was adjudged to be a local factorship, which met all the requirements, without introducing the difficulties arising from a partnership.[12]

12. *Local factorship.* B, C & D, grocers, traded, at Titusville, as B C & Co. E & F, in N. Y., supplied the store fixtures, paid half the rent, and consigned the stock, taking a sum equal to half the profits, and bearing 1-2 the losses. A sold goods to B C & Co., and joined E & F as defendants in his suit for the price.—Judgment for E & F. A

del credere factorship meets all the requirements, without resorting to a partnership. Edwards v. Tracy, 12 Sm. 374, Pa. (1869).

Gift.

The transaction may be a gift. The party might control the business, but not for himself. The abnormal position is conceivable. The motive, though unbusinesslike, might operate, and make the party act from disinterestedness, for the benefit of the inexperienced partners. Ordinarily, the law would not consider the motive, but judge by the fact. It is only the exceptional cases, when the person dealing with him knew that he was not acting for himself, that would induce the law to enter into the motive.[13]

13. Tracy v. McManus, §48, n. c.

CHAPTER II.

SUB-PARTNERSHIP.

§68.

The Roman law has furnished a maxim, *Socii mei socius meus socius non est*,[1] My partner's partner is not my partner. The maxim expresses a principle of partnership, important for the determination of the relation of the partners to each other. The principle, in its affirmative statement, is called *delectus personae*, or choice of a partner. The maxim may be admitted as a doctrine of the Common law, provided it is understood to imply no more than the proposition that the

typical partnership results from the free selection of the partners who choose each other. The application of the maxim and principle to the *societas* of the Roman law was absolute, because partnership meant nothing but joint ownership of property arising through contract. The relation comprised only the reciprocal rights and duties of the partners between themselves. Their liability to third persons was determined, not by the law of partnership, but by the general rules which define the responsibility of co-principals and co-obligors. The maxim first stated had, therefore, no application to the question of a partner's liability to third persons. The disposition to so apply it at the present day results from a misconception of its original import.[2] What the common lawyers call the doctrine of partnership is largely made up of the principles which govern the responsibility of co-principals and co-obligors. As to that portion of our partnership law, the maxim can have no application. A man's liability as a partner to third persons cannot be dependent upon the *delectus personae.*

A partner, for example, may assign a part of his interest in the firm to a third person, and share his profits and losses with him. This constitutes a sub-partnership, but does not make the assignee a partner in the firm. The assignment here referred to presupposes the perpetuation of the firm, and the continuance of the assignor as a member, and is, therefore, to be distinguished from the absolute assignment by a partner of his interest to a stranger, which works a dissolution of the firm. The knowledge of his co-partners, and their assent to the assignment, is nothing but an acknowledgement of his right to use, or

dispose of, his share as he pleases, and does not necessarily involve the reception of the assignee into the firm. There is no *delectus personae* or agreement by the co-partners to accept the assignee as a partner, or by him to assume towards them the responsibility of the relation. On the other hand, a partnership is created between the assignor and the assignee in respect of the assignor's share in the firm. It is evident that this partnership is not a relation independent of the original firm, as is the case where one man is the common member of two firms, engaged in different branches of business, but is interlocked with the business of the principal firm. No profits or losses accrue to the sub-partnership, except through the business of the main firm, and the assignee obtains a modified control over the firm stock by reason of his co-ownership with the assignor of his share. By reason of this co-ownership, he would be entitled to prevent his assignor and the other partners from diverting the firm stock from its original destination. This privilege is not to be denied the assignee, on the ground that the assignmeut of a partner's share conveys no title to any portion of the firm assets. It is true that the assignment of a partner's share conveys no unincumbered title to a purpart of the firm stock, but an assignee does, nevertheless, become a co-owner of the firm stock with the original partners, subject to their rights, and to the requirements of the firm. The sub-partner, however, would have no right to participate in the management of the business. His contracts would not bind the firm. But he would be liable as a co-partner to the creditors of the firm, because he is a co-proprietor of the firm stock, and interested in the

profits and losses of the business. In case of loss, and of the insolvency of the assignor, the assignee has no claim for contribution against the other co-partners, nor have they any recourse against the assignee. But the liability of the assignee to third persons is not dependent upon his right to contribution. It follows from his status as a co-proprietor in the business. By virtue of the assignment, he has become, to the extent of his portion, as much a co-proprietor and co-principal as his assignor, from whom he differs only in respect to the privilege of taking part in the management of the business, and of the right to enforce contributions against the other partners. His right to contribution against his assignors is, of course, undoubted.

When the form of a sub-partnership is used to introduce a partner into the firm, he becomes, in all respects, a partner. If, therefore, he did bargain with the partners for a direct share of the profits, and agreed to bear a corresponding portion of the losses, the right to control the firm business, with which a sub-partner has nothing to do, would decide the question.[3]

1. D. 50, 17, 47; D. 17, 2, 20.

2. *Co-owner of partner's share not a partner.* C, D & E proposed that B should enter into partnership with them in wool-brokerage, but, being a purchasing agent of different manufacturers, he refused. Then they agreed that B should be jointly interested with E in the firm, and share his profits and losses. The firm had no capital. When A heard of the agreement, he sued B for salary.—Not a partner. Did not share firm profits, or take part in management of business. Burnett v. Snyder, 81 N. Y 550 (1880).

C assigned to B 1-3 of his 1-2 interest in the firm of D & Co., agreeing to collect and hand over 1-3 of his profits, and B agreed to reimburse 1-3 of C's losses. A joined B in a suit against D & Co. on the endorsement of an accommodation note.—Not a partner. No *delectus personae*, or share of firm profits. Bank v. Norris, 43 L. I. 56 (1886).

Should this doctrine be maintained, the assignor might be a dummy, and the assignee would obtain all the ad-

vantages of being a partner without incurring his liabilities.

3. *Assignee of partner's share may become a partner by consent of the co-partners.* C, one of three partners, assigned, out of his own interest, to B 1-8 of all profits and losses of the firm, to date back from its commencement, in order to make him a partner. B accepted the assignment, and the other partners received him. The business was carried on without changing the firm name or opening new accounts. A sued on the renewal of a note given for services rendered the firm before the assignment.—B liable as a partner by relation. Earon v. Mackey, 10 Out. 452, Pa. (1884).

CHAPTER III.

HOLDING OUT.

§69.

Holding out entails a partnership liability.

Holding out may occur in three ways. A man may hold himself out as a partner in a firm by his direct act or declaration. He may be held out as a partner of the actual members, with his consent, or with his knowledge and without his prohibition. That is, a man may be held out by his consent or by his negligence. In each of the three cases the measure of responsibility is the same towards all persons who deal with the firm on the credit of his name. The distinction, therefore, which has been taken between a holding out by direct authority and a holding out by negligence is unfounded. It has been said that where the holding out was by the person's authority, consent or connivance, the presumption is absolute that he was so held out to

every customer of the firm;[1] if by his own negligence, then only to such creditors as were misled thereby. But by no principle of law can a man who is not a partner be made liable to persons who have in no way been misled by his acts, and, on the other hand, there can be no difference between acts which are the result of negligence and acts which are the result of intention as a source of civil liability.

Where a man takes part in the management of the business, and acts as a partner, he charges himself with the liability of a partner by his conduct. This is not a typical holding out, for in that case the party takes no part, and has no interest, in the business. If he does take part, he is liable as a principal, upon the contracts to which he is an actual party, without reference to his status as a partner *inter se*.[2] If an attempt is made to charge him with liability as a partner, on the ground that while he was not a party to the contract upon which suit was brought, nevertheless his general conduct as a manager of the firm business, although unknown to the plaintiff, estopped him from denying the partnership, no liability would be incurred under the head of holding out, because the defendant made no representations to the plaintiff.[3] A course of conduct might be evidence tending to show a partnership,[4] but it does not amount to a case of holding out, unless the conduct was known to the plaintiff. An attempt to establish a case of holding out involves the admission that there was no partnership.[5]

Where a man has allowed his name to be put, or to remain, in the firm designation, he must be liable to all persons who deal with the firm under that designation.[6] They necessarily give him credit when they

deal with his name, whether they knew and relied upon him personally or not. If the individual's name is not a part of the firm designation, but his connection with the firm has been indicated by some formula, as, for instance, by the term 'Co.,' he would be liable after retirement to every one who dealt with the firm under the old designation, with knowledge of his connection, and without legal notice of the change, whether he authorized the remaining partners to use the old firm name or neglected to have it altered.[7] If the individual's name is not a part of the firm's designation, either literally or by a formula, but he is held out as a partner, either by himself or by the actual partners, without contradiction from him, he is liable only to those persons who gave the firm credit on the faith of his supposed connection with it; that is to say, those persons who knew of the holding out, and were ignorant of his true relation to the partners.

When it is said, that in order to charge a nominal partner it is necessary that the customers should have dealt with the firm on the nominal partner's credit, it is not meant that the customer should have considered the financial standing of the nominal partner, but only that he should have had him in mind as a member of the firm, and a party to the contract. If the individual has allowed his name to be used in the firm designation, the creditor has a right to conclude that there is some person in fact answering to that name, who guarantees the performance of the contract. The individual answering to that name, if responsible for its presence there, is the one who is bound for the performance, whether he was personally known to the creditor, or not, at the time of the contract.[8]

The doctrine of holding out implies that the person whose liability is established in this manner, not only has no interest in the firm, but takes no actual part in the business. There can not be a case of holding out, unless there be a person to whom the nominal partner was held out. Holding out means "representations," and they must be made to some one, viz., the plaintiff. A nominal partner, to differentiate his case, must have no interest in the firm, or he would be liable on the general rule, whether known or unknown. He must not be a party to the contract by actual personal intervention in the transaction, or through an agent, for then he would be liable as principal or co-contractor, on the general principles of the law of contract.[9] Holding out, by its very terms, means that the defendant is neither partner in fact nor co-promissor in form.

Where parties do business under a common designation, without any agreement of partnership between themselves, they incur the liability of partners.[10] The case is strengthened where the business is managed by a common agent. The public is entitled to infer from the single name a solidarity of interest between them. Their liability is founded not upon a representation of partnership, but upon the fact that they have authorized a business to be conducted on their behalf in a manner which implies a partnership.[11]

Where a man's name is used without his consent, notice to the person making use of the name, not to use it, or extorting a promise from him to that effect, would not relieve the party held out. The notice should be given to the customers, not to the party. Accepting his promise would confirm the impression

that the alleged partner relied upon the promise for his protection, and indirectly authorized the continued use of his name, by trusting it to the discretion of the promissor, and by looking to him for indemnity.[12]

Holding out is not established by proof of public notoriety, unless the fact is known to the party sought to be charged as a partner.[13] The reputation could not make out a partnership, or enlarge the scope of a partnership already established.[14] If general reputation were introduced as evidence to charge the defendant as a partner, he could rebut it by general reputation of a dissolution.[15] The evidence would be equally competent for both purposes. Thus, a new customer, who relied on general notoriety of the defendant's being a partner, might be met by a dissolution not properly notified, but equally known to the public. The reputation must be brought home to the party sought to be charged by it as a partner, before he can be called upon to refute it.[16]

But the express authority, or direction, given by a person to use his name, is an announcement of membership. Admissions and acts are equivalent to such a formal declaration, and commit the person as a partner.[17] He has identified himself with the firm, and cannot extricate himself from it, except by a dissolution. The transactions of the firm will not be invalidated, in order to relieve him from the liability which he has assumed. When the actual partners hold out a third person as their partner, they invest him with the powers of a partner. A firm note made by him would bind the firm, himself included, in the hands of a holder, who did not know who made the note, but took it on the general credit of the firm.[18]

When a man is held out as a partner by the real partners, so as to make him liable in person and in estate, he is entitled to control the firm assets for his relief. As he does not exert his control by virtue of any right of ownership, there is no occasion to attribute to him any share in the property of the firm.[19]

It is an anomaly that one who is not *sui juris* could be bound as a partner. But if he does not disaffirm the partnership when he becomes *sui juris*, he will be a partner, and, by relation, from the beginning.[20]

A defendant may be entitled to object, if a partner by estoppel is not joined as co-plaintiff. The defendant might have a set-off, or counter-claim, which would be available only against all the partners.[21] If the services had been rendered upon the credit of the partner held out, the employee might insist that the partner by estoppel, although without any interest in the firm, should be joined as a plaintiff, in order to set off his salary against the firm claim.

A partner by estoppel, it has been decided, cannot be put into bankruptcy, because he would be charged indiscriminately for all the firm debts, when he is liable only for those incurred upon his credit.[22] It is difficult to comprehend this decision. Bankruptcy is a branch of equity, and it is the function of a court of equity to marshal the assets among the claimants, according to the character and extent of the claims.

1. *A man's name in the firm designation charges him as partner to all who deal with the firm.* Secor, Swan & Co. was dissolved, by the retirement of Wm. H. Secor, the senior partner. The business was continued by the remaining partners, who bought the use of Charles F. Secor's name, for $200, and kept up the trade style of Secor, Swan & Co. A sold them goods, but without knowledge of the arrangement, or of Secor's connection with the firm. They failed, and A sued Secor, as defendant.—Recovered. The object of the arrangement was to lend credit to the firm, and effect could be given to the agreement only by holding him liable as a partner. If not liable to all creditors

of the firm, he would be liable only to customers who knew of his connection with the firm, but did not know the arrangement by which he sold his name. Otherwise, if the customers knew the terms of the arrangement, or if they did not know of his connection with the firm, they could not hold him. He was treated as if an actual partner. Pollion v. Secor, 61 N. Y. 456 (1875).

2. *Manager acting as a partner does not hold himself out as a partner.* B, sr., general manager of B & Co., had sole power to contract for firm. B, sr., negotiated with C, signed contract with firm name, and gave C firm note for price. B, jr., could not act in the negotiation, without B, sr. C dealt with B, sr., as partner. Evidence admitted that B, sr.'s, name published in Directory, 1880–1, and 1881–2, as partner in B & Co. He testified that he did not know the fact until after publication of Directory for 1880–1, and then refused to take copy, unless correction made. No further effort. A, holder, sued B, sr., as partner. Court charged that B, sr., acting as a principal, and C's believing him to be a partner, would justify verdict for A.—Reversed. Ihmsen v. Lathrop, 8 Out. 365, Pa. (1883).

The reason given by the court for the decision is untenable. The manager, it is true, did only what he was employed to do; but he was employed to act as a partner, and exert the functions of a partner. He held himself out as a partner, and must look to his employers for indemnity, if he did it at their request. He identified himself as a partner, not only by transacting the firm business, as if he were a principal, but by using the firm name as if it were his own, without any sign of agency. He was enabled to assume the firm designation with effect, because his son's name formed part of it. The plaintiff, who knew nothing but what the defendant assumed to do, and actually did, and was not called upon to pry into the secret arrangement existing between him and his associates, dealt with the defendant as a partner. The plaintiff had nothing to do with the actual relation between the defendant and his associates, because he was not a party to their contract, and his right to recover cannot be abridged by its terms. His claim is independent of the contract, and paramount to it.

Manager of firm business a partner as to customers, unless he tells them he acts only as agent. A sued B, C & D, C's wife, for goods sold B & Co., and also declared, on note given in liquidation by C in B & Co.'s name, which he habitually signed in the course of his general management of the business. C's defence: Acted as agent for his wife in the management.—Judgment for A. C liable, because he acted as manager, *inter alia*, signing firm name, without telling A he was not a partner. Dodd v. Bishop, 50 La. An. 1178 (1878).

Acting as partner sufficient to sustain verdict, without proof of partnership. B got A to manufacture fanning mills, and told him C, et al., were co-owners of the patent-right. A's evidence: C present when mills ordered and B's statement made. A applied for payment to C,

who put him off until sales could be made. C stated: "we have them (the mills) to sell."—Verdict for A, and judgment affirmed. Shafer v. Randolph, 3 Out. 250, Pa. (1881).

Acting as partner sufficient to justify verdict. A sued C, as B's partner. Court charged that unless an actual partnership between B & C, verdict should be for C.—As evidence was not sufficient to show the interest of a partner, or acting as such—Judgment affirmed. Harris v. Sessler, 3 S. W. Rep'r 316, Tex. (1887).

3. *Signing partnership contract by mistake not equivalent to holding out.* A sued B1 & B2 as partners. Court admitted evidence of their contract, as B Bros., with D, for the construction of a reservoir, followed by proof that A had furnished them materials for, and used by, them in erecting the structure.—Error, because no offer to show A knew of the representation, and acted on the faith of it in selling defendants the materials. Denithorne v. Hook, 2 Am. 240, Pa. (1886).

The defendant executed the contract for the construction of the reservoir by mistake, and no business was ever done under it. The contract did not amount, therefore, to a partnership *inter se*. But, as signing the paper was a transaction indicative of partnership intention, the defendant would have been liable, had the plaintiff known and relied upon the act.

4. *Course of conduct evidence of partnership.* A & B were sued, as partners. A firm-bond had been given by A, and ratified by B. This act, coupled with B's indefinite language and frequent presence at the place of business, was relied on to prove partnership.—Sufficient. Conklin v. Barton, 43 Barb. 435, N. Y. (1864).

5. The plaintiff's effort to charge one as a partner on the ground of holding out, results, ordinarily, from a default of evidence to prove actual partnership. He virtually concedes that there is no partnership, and tries the issue of holding out. To make the plaintiff prove defendant's secret of a partnership, and, upon a failure, to let the defendant use the evidence upon that issue to rebut his liability for representations of partnership, would make holding out a species of actual partnership. On the contrary, it is the opposite of a partnership *inter se*, and exists only *quoad alios*.

Contract inter se and firm's financial standing irrelevant on the issue of holding out. A sued B, C & D *in assumpsit*. D's defence to A's evidence of admissions, made to him by D before the cause of action arose, that he was a partner: Offer to prove: 1, Contract between B, C and himself, for management of firm business; 2, the insolvent condition of firm at the date of alleged admission.—Rejection of evidence sustained, and judgment affirmed. Reed v. Kremer, 1 Am. 482, Pa. (1886).

The evidence was irrelevant. The issue was not an actual contract, but admissions, which raised a contract by construction of law. The actual contract between

the defendant and his associates would be competent, if not the best, evidence, upon the issue of partnership *inter se;* but it would not negative an implied liability arising from D's representations without any partnership between them. The insolvent condition of the firm was also foreign to the issue. The admission was, it is true, against interest, but that feature does not discredit the testimony.

The public knows nothing of a partner, except by his acts and declarations. The contract of partnership is private, and its terms need not be divulged. The partnership contract does not affect the question of holding out. The contract is between the partners. Holding out is between partners and strangers. Evidence of the relation subsisting between the parties is incompetent, because it does not concern creditors, unless it is an admission of partnership. The domestic secret cannot prejudice outsiders. They judge by appearances, and take a man at his word. The acts of a principal are abundantly sufficient to make out a partner, although he has no interest in the stock, or profits, of the business. The inference, drawn from his acts, after they have been established, is a construction of law.

Partnership contract no bearing upon the issue of holding out. B, in pursuance of agreement, sold his stock in trade to C & D, taking notes, signed by C in C & D's name. A sign, C & D, was put up, and business carried on for two years. D was seen, occasionally, in the store, and told E, and others, he was a partner. E, in consequence, recommended the firm to A, who sold them goods, and, to balance account, took note of C & D. A sued them in assumpsit as partners. Defence: Two agreements prior to notes given B, the first between D and his brother, substituting him in agreement with B; the second, agreement of partnership between C and the brother.—Recovered. "Otherwise two persons," said the Court, "might hold themselves "out to the world as partners, say to every one that they were part-"ners, and years afterwards a secret article of partnership between "the irresponsible partner and another irresponsible person of the "same surname as the only responsible party, may be produced to "relieve him, and defraud all the creditors of the firm who have "given credit to it solely on the faith of his name." Drennen v. House, 5 Wr. 30, Pa. (1861).

B & C, brewers, who were sued by A, as partners of D, the lessee of a restaurant, offered their books in evidence to disprove testimony that work done in fitting up the restaurant was paid for with beer from their brewery. There was also evidence on the part of the plaintiff that B was present while work on the restaurant was in progress.—Books rejected. "However competent, this evidence would "have been between the parties themselves (B, C & D), certainly it "was not as against the plaintiff (A), who was a stranger to their acts." Ganzer v. Fricke, 7 Sm. 316, Pa. (1868).

6. The decision in Pollion v. Secor, *supra*, n. 1, can be explained upon this ground.

7. *Judgment by default against two in a similar case relevant to charge either as an admission of liability, though it does not prove a partnership.* B & C dissolved, without advertising dissolution. B made firm note to D, which A, who did not know of the dissolution, discounted for D. A sued B & C, and offered in evidence the record, and payment of a judgment by default against B & C on another note made by B under the same circumstances. Defence: B offered to testify that he made the note in suit without C's knowledge.—Judgment for A. Record relevant, although superfluous; default an admission of liability by C to pay similar notes, though it does not establish a partnership. B's testimony irrelevant. The want of notice supplied the defect of authority. City Bank of Brooklyn v. Dearborn, 20 N. Y. 244 (1859).

8. *Supra* n. 1.

9. *Acting as a partner charges one who is not a partner.* A sued B & C for goods sold B & Co. C ordered some, and said he would pay for them. A relied on his representation. C's defence: Not averred to be a partner, and not one in fact.—Judgment for A. Averment, like partnership *inter se*, unnecessary. Entry of charge against firm sufficient to hold C. Hancock v. Hintrager, 60 Iowa 374 (1882).

Promise estops partner from denying partnership. B, C & D bought goods of A, to be delivered after the first of the month, on representation that D would contribute capital, and become a partner on that date. A sued D, as partner, for price.—Liable on his representation. Stiles v. Meyer, 7 Lans. 190, N. Y. (1872).

Holding out applies to agents as well as to partners. The agent once held out will be liable in transactions of the same generic kind. The limit in a partner's dealings is defined by the firm business.

Holding out agent, and sharing profits with him in one operation, makes him an agent in similar transactions. A, London merchants, at B's suggestion, speculated in currants, and, in order to induce B to exert himself, and to compensate him for his services, A agreed to give him 1-2 the profits. A opened a separate account, which he headed joint transactions with B, for money which he had received from C, a broker, who filed a cross-bill, to charge A for B's speculations in other commodities.—A was liable for B's operations, because he held B out as his agent, and gave him half the profits. Pole v. Leask, 9 Jurist N. S. 829 (1863).

10. *Joint name creates partnership liability.* B owned a vessel, and was a common carrier. C, his son, was engaged with him, and they did business and gave receipts as B & C. A shipped goods by them, believing that B & C were partners, and sued them in assumpsit for a loss caused by a collision. C's defence: Not a partner.—Liable, because held out as a partner. Mershon v. Hobensack, 2 Zab. 372, N. J. (1850).

Co-operative meat market a partnership. B *et al.* formed co-operative association, to buy meat at wholesale and sell it at retail to members and others. Subscriptions voluntary, ranging from fifty cents to five dollars. The only object was to dispense with middlemen, and

sell meat directly to customers who paid as usual at the association market. Officers of association elected, who appointed agents for purchase and sale, accountable to them. A sold association meat, and sued B *et al.*, president and treasurer. No evidence of any subscription by B *et al.*, or of A's knowledge of their membership.—Recovered, because partners by using firm designation, though not held out, and no reliance upon undisclosed principals. Davidson v. Holden, 10 A. Rep'r 515, Conn. (1887).

11. *Delegation of business to common agent makes proprietors partners.* B, C, D & E, each owning a steamboat, employed in carrying freight and passengers on the Mississippi, appointed F their common agent, who had managed the transportation business, by the designation of the F line, for 8 years, when A shipped the merchandise for the loss of which he sued the four. They transacted no business separately, had no property in common, and each received the net profits of his own boat.—Judgment for defendants reversed. Joint transaction of business by common agent charged proprietors, without proof of plaintiff's reliance upon the fact of a partnership between them. Sun Ins. Co. v. Kountz Line, 122 U. S. S. C. R. 583 (1886).

The decision was correct; but the circumstances of the case amounted to a virtual representation of partnership to the shipper. The agent undoubtedly described his enterprise as a unit, and included all the boats under one name, his own. This representation each subsidiary corporation authorized the agent to make. It was made by the agent in the case in which suit was brought. The shipper did not ship by any particular boat; he shipped by the Kountz line, and his bill of lading was so signed and attested by A B, agent of said line. It is a question of fact who were the "Kountz line." Investigation showed that the four or five boats were doing business under that joint title, and they authorized the bills of lading to be so made out. The statement is that they were "actually doing business." This, therefore, is not a typical case of holding out. It is, rather, analogous to those cases which refuse to sustain the private agreements of partners respecting their shares of profit and responsibility against the demands of creditors. All the different companies, by the manner of conducting their business, became parties to every contract. The contracts were in the name of the Kountz line, and that title covered every one of them. They together formed the Kountz line. They did their business as a unit, so far as the public and this particular defendant were concerned. The principle of the case seems to be, that where different persons do business under a common designation, that is to say, under a firm name, if you please, they become liable *in solido* upon every contract

taken or entered into under that name, just as they would be were they actually partners, or just as they would be had all joined expressly, and by their individual names, in the contract, whatever the private arrangement was.

12. *Partner must notify customer, or prevent use of his name.* B, knowing that C did business as B & Co., told C not to use his name, so as to hurt him, which C promised not to do. A sued B on a promissory note, signed B & Co. by C.—Liable. B relied on C's indemnity. Smith v. Hill, 45 Vt. 372 (1850).

13. *Reputation insufficient, unless fact known by reputed partner.* A, who sued B, C, D & E for a deposit, proved a common report that they were partners, but not that D & E knew of the report.—Judgment against defendants stood against B and C, but replaced by judgment for D & E. Gaffney v. Hoyt, 10 Pac. Rep. 34, Idaho (1886).

14. *No prima facie case of partnership established by reputation.* B contracted a partnership with C and two others, of Chicago, to deal in Montana furs. C bought groceries from A, showing him articles of co-partnership, and telling him B would pay for the groceries. A sued B.—Non-suit. Purchase beyond scope of business. Evidence of reputation to enlarge its scope, incompetent to make out *prima facie* case against B. Taylor v. Webster, 10 Vr. 102 E. & A., N. J. (1878).

15. *Public notoriety, if a ground to charge, is a ground to relieve a retiring partner.* Firm name and sign of B & C was Atlantic Forge Co. C managed the business in his own name, which was also on the sign. B withdrew without publishing notice. C took in D, and changed sign to C & D. A new customer, A, knew of B's connection with the firm by reputation, but not of the dissolution, though it was a matter of public notoriety. A sued B for goods sold to C.—Judgment for B. Public notoriety, if ground to charge, is a ground to relieve a retiring partner. Holdane v. Butterworth, 5 Bosw. 1, N. Y. (1859).

16. *Declarations become competent if known by alleged partner and not denied.* A sued B & C, as partners, on notes signed by "D, agent." C denied partnership, but court refused, at his request, to charge that if B represented to A that C was his partner, and A, on the strength of these representations, lent them money, and if A told C of the representations, who made no denial, he would be liable.—Judgment reversed. Slade v. Paschal, 67 Geo. 541 (1881).

Plaintiff's evidence of reliance upon defendant competent, if followed up by facts showing holding out. B circulated handbills in his and C, D & Co.'s name, calling for workmen to get out and haul railroad ties. A sued B, C & D for ties delivered, but effected service only upon C & D. Evidence admitted: 1, That B had said he was in partnership with C, D & Co., but not in their presence; 2, Evidence rejected: A's testimony, upon whose credit he did the work, and, 3, admitted that C, D & Co. took charge of ties, and also their receipt from B, showing his sale to them.—Judgment for A reversed: 1, incompetent; 2, competent; 3, subsequent to transaction. Remel v. Hayes, 83 Mo. 200 (1884).

Clerk's knowledge of holding out imputed to principal. A sued C on certificate of deposit made with B & Co. Evidence: B's testimony, advertisement of B & C's partnership in banking for five months in newspaper taken by C, and letters written by B to C under

firm letter-heads. C's defence: He could not read, did not know of advertisement or letter-heads, and clerk read letters to him.—Judgment and verdict for A affirmed. Rizer v. James, 26 Kan. 221 (1881).

17. What evidence is competent to charge the party held out? Proof of any act, or admission, by him that he is a principal in the business. His name in the firm, on the sign, firm acts or declarations, though not made to the plaintiff, are sufficient to charge the defendant. He must disavow and prevent the use of his name. Holding out is a question of fact, and belongs to the jury.

Holding out for jury; if sufficient evidence, known to plaintiff, and acted on by him. Whether husband a principal or agent for his wife, the nominal partner, for jury. Three brothers, B, C & D, in 1875, went into partnership in the lumber business. B furnished the capital, $6,000. He sold out, in 1876, to C & D, taking their note for the $6,000, and they agreed to pay the firm debts. The dissolution was duly advertised, and notice sent to all customers. C assigned his interest to B's wife, E, and died in 1877. D & E gave B their judgment note for his $6,000. B helped to conduct the business, and ordered lumber of A, in the firm name. A obtained a verdict against B and D after striking out E as defendant.—Jury competent to decide question of holding out, if sufficient evidence of it, which A knew and relied on in selling. Jury also decides whether B is a principal or the agent of his wife, the nominal partner. Burgan v. Cahoon, 1 Pennypacker 320, Pa. (1881).

Admissions. A sued B, co-owner of a steamboat, on a note given by C & D in adjustment of a loss for goods damaged on the transit from Pittsburgh to St. Louis. The evidence against B was a bill of sale by C to E, who said he was a trustee for B, and also B's admissions to others.—Judgment for A. Hill v. Voorhies, 10 Harris, 68, Pa. (1853).

In what order must the plaintiff proceed to establish a partnership? The members form a circle, and the plaintiff can begin with any member. The admissions of the different partners are sufficient, and if each admits in turn, the relation is established. A declaration of his membership, made in a partner's presence, and uncontradicted by him, would be an admission. No partner can admit, except for himself, but his admission implicates his co-partners as the other parties to the contract. As an admission, it binds him, and, as his declaration, it is evidence against them, if followed up by their admissions, acts and declarations.

An admission by one, unless in the other's presence, incompetent to prove them partners. A sold sheep to B, and subsequently hearing that C was his partner, sued B & C's administrator for the price. B denied partnership, but his declarations, made in C's absence, that C was a partner, were admitted in evidence.—Error. B's declarations incompetent to prove partnership. Cowan v. Kinney, 33 Ohio St. 442 (1878).

Admissions of alleged partner incompetent to prove partnership. A sold goods to B, who failed. A sought to hold C as B's partner, and prove B's declarations, that C was his partner, and to set aside C's judgment. C's defence: Only transaction with B was to let him coal C's timber for 4-5 of the coal, and holding his note.—Evidence incompetent to prove partnership. Flanigan v. Champion, 1 Gr. Ch. 51, N. J. (1838).

Declarations incompetent to charge one as partner if he did not approve them. A sued B for balance of account. B plead a set-off. A averred that debt set-off by B was owing to B & E, as partners, and offered letters of E to A to establish the partnership. Rejected. E not party to suit, and letters not admissions, nor competent evidence, if not made in B's presence, or ratified by him.—Verdict and judgment for B affirmed. Flournoy v. Epping, 68 Geo. 707 (1882)

Contra. A sued B & C, for merchandise furnished D, whom A alleged was B & C's partner. B & C denied partnership. A offered B's letter to D, enclosing business license in name of B & C. Rejected, on ground that declarations of B in C's absence were incompetent.—Error. Rogers v. Suttle, 19 Bradwell 163, Ill. (1885).

18. *Holding out partner charges for his promise of firm acceptance.* A, B & C agreed to go into partnership as soon as B contributed $6,000. In meanwhile, they rented office, put up sign, and got out letters and bill-heads in firm name. C, for firm, employed agent, promising to accept draft in plaintiff's favor for agent's services. Acceptance refused, and plaintiff sued firm as acceptors. A denied partnership, because B had never contributed $6,000, and A had never authorized use of his name, except by allowing firm sign to be put up. —Sufficient evidence of holding out, and agent dealt with them on faith of partnership. Plaintiff may enforce agent's right. Burns v. Rowland, 40 Barb. 368, N. Y. (1863).

Firm note charges partner held out. B's share in firm of B & Co. was sold out by the sheriff, and bought in by C & D, his partners, who continued the business as B & Co., employing B at a salary. A sued B on a firm note made after his interest had been sold.—Liable, because he did not forbid the use of his name by the firm. Freeman v. Falconer, 12 J. & S. 132, N. Y. (1878); 579 (1879).

19. *Liability of partner by estoppel entitles him to control interest for his protection.* B & C traded as B & Co. C retired, and A, his wife, took his place, putting in some capital advanced by her father. She was really acting as trustee for C. She sued B for an account. Defence: A trustee for C, and had no standing as partner.—Decree. C was, of course, the partner in fact, and his creditors could take A's nominal interest in firm as his property. But she was liable as ostensible partner, and had the right to control the share, which she held as trustee, for her own protection. B waived C's joinder as plaintiff or defendant by denying his interest. N. Y. Statute, Laws, 1860, Ch. 90, §1, §2, permits married woman to trade on her own account. Bitter v. Rathman, 61 N. Y. 512 (1875).

Partner by estoppel entitled, with partners in fact, to marshal assets in relief of their joint liability. B1 secretly retired from firm of B & C, composed of B1, B2 & C. B2 & C continued to use firm name of B & C, with B1's assent. D made a note, which B & C endorsed to A. At same time D gave B & C a chattel mortgage, as security for present and future endorsements, and subsequently transferred to them the mortgaged property which they *inter alia* assigned to E for creditors. A having recovered judgment against D, maker, and B1, B2 & C, endorsers, claimed to be subrogated to B & C's place in re-

spect to the mortgaged property, in preference to other creditors. Defence: While B1, B2 & C were liable on the note, they took no joint title to mortgaged property, for B1 had retired. Hence no subrogation, because parties were different.—Subrogated. Mortgage was given to cover, and did cover, liability. Buffalo City Bank v. Howard, 35 N. Y. 500 (1886).

Would a partner by estoppel be disqualified on the ground of interest? He would have no interest in the business, but he has an interest in the matter in suit. If an action is brought against the real partners, and a judgment recovered, but no satisfaction obtained, he is liable to the creditor in an independent suit.

20. *Failure to deny partnership at age is holding out.* B acted as a partner with C until nearly of age, and did not disaffirm the partnership at age. A, who sold C goods afterwards on B's credit, sued him as a partner.—Liable, as he became a partner by failing to disaffirm the contract at age. Goode v. Harrison, 5 B. & Al. 147 (1821).

Married woman as partner. Partnership between A & B, a married woman, continued 6 years after husband's death. B died, and her executor brought account. Defence: No partnership, because B a married woman.—Bill sustained. Though no partnership during coverture, continuing the business after husband's death created a partnership from the beginning. Everit v. Watts, 10 Paige 85, N. Y. (1843).

21. *Holding out makes partners plaintiffs, as well as defendants.* A sued C, acceptor on bill of exchange drawn by A & B. C pleaded non-joinder of B, who was a clerk in A's business, which, however, was carried on in the name of A & B.—Plea sustained, because B held out as partner. If C had a set-off against A & B, she could not use it, unless B joined as plaintiff. Guidon v. Robson, 2 Camp. 302 (1809).

Contra. Nominal partner need not be joined as co-plaintiff. A furnished capital and B his labor for half the profits, but without any interest in the business. A sued C for work and materials furnished by firm on contract made by B in the name of A & B. C pleaded non-joinder of B, and set-off of claim against him.—Action maintained. B, though nominal partner, had no interest in the contract. Bendell v. Hettrick, 3 Jones & Spencer 405, N. Y. (1873).

22. *Bankruptcy procedure excludes a constructive partnership.* A et al. petitioned to put B et al. in bankruptcy as partners, on the ground that they held themselves out as directors of "The W. Bank." The referee found that B et al. did not know that they were held out as directors.—Dismissed. If B et al. had been held out with their knowledge, they would be liable to no creditor who did not, in dealing with the bank, rely upon them; but if adjudged bankrupts, they would become liable also to creditors of the bank, who did not know of the holding out. In re Murray, 13 Fed. Rep'r 550 (1882).

§70.

The nominal partner may be sued with the partners in a joint action.

Having established holding out as a ground of liability, the question arises, how the individual held out is to be charged. Is he liable in a separate action alone, or may he be sued with the actual partners in a joint action? According to the English view, although the holding out charges the individual with the liability of a partner, nevertheless, as there is no partnership *inter se*, and the liability is made to rest upon the independent ground of estoppel, the action must be several. And further, the remedies are alternate, and if the creditor has judgment against the nominal partner, he cannot afterwards sue the actual partners; if he has judgment against the actual partners, he cannot afterwards sue the individual who has been held out.[1] This view involves a mistaken notion of the effect of holding out. When a man is charged with responsibility as a partner, the creditor should have against him the remedies which may be employed against any partner. The individual held out must have been in the contemplation of the creditor a party to the joint contract of the firm, otherwise he would not be liable. Why, then, should he not be liable in a joint action? How can he inject himself into the joint contract, and yet escape the joint suit? The basis for the joint action is the joint contract with the creditor, and it is a matter of no moment by what anterior processes the co-promissors made themselves parties to that contract. The explanation of the rule

is to be found in the disposition to deduce partnership liability solely from the partnership agreement. It is true that persons cannot be made partners between themselves, except by their own agreement, but the primary object of this agreement is the regulation of the rights and duties of the partners between themselves. Their liability to third persons is determined by the law, and is nothing more than the ordinary responsibility of the parties to a joint contract. Partners are not liable to third persons upon their partnership agreement, but upon obligations incurred independently in the course of the business. If these obligations are incurred with the concurrence of all the partners, it is a matter of no moment whether they were contemplated in the partnership agreement, or not. Therefore, as to creditors who sue the partners in a joint action, the question hinges not upon the nature of the partnership agreement, but upon the concurrence of the partners in the contract upon which suit is brought. The partner by estoppel is undoubtedly a party to this joint contract, and the creditor should be enabled to sue him as such, though he had no part in the partnership agreement.

It is true that partnership is a question of intention, and that the contract upon which partnership liability is based, is a question of intention, but the intention which underlies the partnership agreement is different from, and not necessarily the parent of, the intention which forms the basis of the obligation to third persons. The confusion arises from the attempt to deduce all partnership liability from the original intention expressed in the partnership agreement. As far as third persons are concerned, there is no partnership

except upon the question of liability. The only partnership intention which interests, or concerns, the creditor, is the intention to do the act upon which the law, in its function of interpreter, entails the partnership liability. This is the operative intention, in all cases where the law raises a partnership as to third persons, whether by defining the effect of the private arrangement between the principals (§50), or the effect of the public acts of any principal, that is, the holding out. In both cases the man becomes a partner without the original intention *inter se;* in the first case, the court experiences no difficulty in permitting him to be sued jointly with his associates, why should the court hesitate in the second case? Wherever a man has put himself in the position to incur the partnership liability, by whatever course he has done so, he becomes, in all respects, a partner as to third persons, and should be sued as such.[2]

1. *Customer without notice of change in firm must elect between old and new members.* B & C, trading as B & Co., dissolved 27 July, 1874, by C's retirement, but B continued the business with D, under the same name. B & Co. bought, in January, 1878, merchandise of A, who was an old customer, and did not know of the change. He received a circular in February, 1878, announcing the dissolution and notifying him of a liquidation by B, and of the continuation. A continued to sell to B & Co. without changing his account. He took, in July, 1878, B & Co.'s check for the aggregate balance, which included the claim against B & C, and on non-payment sued B & D, who failed in August, 1878, when he proved for the balance against them in liquidation. A then sued C for the claim against B & C.—Judgment for C. A bound by his election. C liable only by estoppel, but B & D the debtors in fact. Scarf v. Jardine, 7 App. Car. 345 (1882).

The election was between suing the new and continuing partner or the retired and continuing partner. Had the plaintiff elected to sue the old firm, defendant would have been deprived of his remedy against the new partner, who was primarily liable as a debtor in fact according to the discription of the court.

2. *Partner by estoppel liable jointly with partners in fact.* A sued B, C & D, late trading as B & Co., for merchandise sold firm in 1872. B & C traded in Cincinnati, as B & Co., from 1866 to 1871. In 1871, B

sold his interest to C and another son, D, who continued business in Cincinnati, and also carried on business in Brookville, Indiana. Notice of dissolution of old, and formation of new, firm published in Cincinnati and Brookville. A had no previous dealings with old or new firm of B & Co. Court, sitting for jury, found for A, and entered judgment.—Affirmed. Speer v. Bishop, 24 O. St. 598 (1874).

Joint action lies against retired, continuing and new partner. A sued B et al., *in assumpsit*, for deposits made with them as stockholders of "The Citizens Bank." B was a partner during part of 1871 and 1872, but he failed to give notice of his retirement and sale of stock. A, who did not know B was a partner, made one deposit in January, 1871, before B became a partner, and one other in 1873, after his retirement. Interest was paid on the aggregate.—B liable with actual stockholders for deposit made after his retirement. Evidence insufficient for jury to infer B's assumption of deposit made before he became a partner. Shamburg v. Ruggles, 2 Norris 148. Pa. (1876).

Partner by estoppel and partner in fact jointly liable. B & C general partners, D, special partner. B retired, but let C & D continue business under name of B & C until outstanding notes were paid. A sued the three for notes given for new business.—Recovered. D, new partner, liable as well as old partners. Bulkley v. Dingman, 11 Barb. 289, N. Y. (1851).

CHAPTER IV.

EXECUTORS AND ADMINISTRATORS AS PARTNERS.

§71.

A partnership may be made to survive a partner's death. The executor, or administrator, would contribute the deceased partner's estate, and replace him in the firm.

Can partners by agreement continue the partnership in spite of a partner's death? In other words, can a man prolong his existence by agreement after his physical death, and by means of the contract perpetuate the firm, so that it shall continue as if he remained alive? If he can, does the executor or administrator, who succeeds the deceased partner in the firm,

personate him? The executor or administrator, who takes the partner's place, does not resuscitate him, but, on the contrary, is compelled to assume the position, because the deceased cannot remain a partner. He must be exchanged for a person who is in existence, to act in the capacity of a partner, and especially to incur the unlimited liability which is the characteristic of a partner. Does the change of persons work, according to the partnership theory, a dissolution of the firm, and make its continuance an impossibility? These are questions which may be answered as follows:

The firm, although said to continue, does not survive, except in form, the partner's death.[1] The executor or administrator adds a new constituent in his personal liability, to the aggregate which constitutes the firm, and a deceased partner takes away an integral portion. Nor is one the complement of the other. If there were but two partners, A & B, who agreed that the death of either should not dissolve the firm, and each made the other his executor, what would the firm gain by the executor's membership to make up for the loss of the deceased partner? But in some of the decisions theory and consistency yield to expediency. The business is the substantial thing which is continued, and the agreement (or the testator's direction) relates to the continuance of the business. To preserve this, the partnership is not dissolved, as it otherwise would be, by the partner's death, but the firm, as well as the business, is continued. The law changes itself for the occasion, and permits the testator to delegate his capacity as a partner to his executor, and if the co-partners have, by agree-

ment, accepted him, or an administrator, in advance, he is the partner's substitute, and becomes a partner in turn. The firm, by the agreement, included him as a member according to its original constitution, although only as an alternate for the partner in the event of his death. The executor, or administrator, being the partner, the deceased partner's estate is his contribution. The executor, or administrator takes the deceased partner's place, and represents him in the business. The unlimited liability of the estate naturally continues in the hands of the representative.[2] Although a partner, he acts as a delegate, and represents the deceased in his capacity to bind the estate.

1. *Executor cannot perpetuate firm after testator's death.* D executed to B and his executors a bond for C's faithful discharge of his duties as clerk. B's will directed A *et al.*, his executors, to carry on his business. They settled up the accounts for B's lifetime, and made a new contract with C, as clerk. He failed to account for his subsequent receipts, and A *et al.* sued D on his bond.—Judgment for D. He did not contract for C, as clerk in executor's business, but in B's, which ended with his death. Barker v. Parker, 1 T. R. 287 (1786).

2. *By contract firm continued after partner's death by administrator. Testator's estate liable, and administrator partner.* B formed with C the firm of B, C & Co., which should not be dissolved by death of either until August following such death, and then should be settled up by surviving and representatives of deceased partner. B died intestate, in October, and C continued business until next August. Then C formed new firm of B, C & Co., with D, son and administrator, and E, administrator of B. New firm paid debts of old, and pledged claim to A, who charged B's administrators as partners between October and August, and B's estate as debtor.—Recovered. Claim put holder in shoes of creditors paid. B's whole estate liable, as no part designated. Administrators partners under agreement for interval. Laughlin v. Lorenz, 12 Wright 275, Pa. (1864).

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§72.

As equity does not specifically enforce the deceased partner's contract, or compel his executor to be a partner, the distributees become special partners.

Where the executor or administrator does not act, in spite of the contract which obliges him to continue the firm, and the courts have no jurisdiction to enforce his performance of the obligation, there is no partner to replace the deceased. The surviving partner continues the firm without a substitute for the deceased partner.[1] The effect of continuing the firm with the deceased's estate, but without a person to succeed him, is to introduce a novelty into partnership law. The fund, or estate, becomes a special contribution, and the beneficiaries of the estate are special partners. The privilege of a special partnership is established for a class. All others must comply with the requirements of the statutes, which regulate special partnerships; but the beneficiaries of a deceased partner are not required to conform to the statutory law. They are special partners by inheritance.

Can a partner grant his executor a dispensation from the law by will? If a partner can get the benefit of the special partnership act by a contract, why can he not abrogate the law by his will? The executor is nothing but the testator's instrument, and is obliged to carry out the will or commit a breach of trust. If there is a contract to continue the firm, the executor must act, in order to save the estate, which would otherwise be liable for a breach. The testator can accomplish the result without an executor; why may he not avail himself of an executor? The emergency surely demands an executor. New York and Maryland have recognized the exigencies of the situation, and have exonerated from personal liability the executor who acted under the direction of the deceased partner in continuing the firm.[2]

1. *Firm continued by surviving as appointee of deceased partner. Administrator can't reclaim money used by surviving partner as guardian, but may share dividend with firm creditors.* B & C formed partnership of B & Co. for 5 years, and agreed that if B died within the period C should carry on the business for himself and B's heirs, subject to advice and inspection of B's executor or administrator; money contributed by B to carry interest, but amount left blank. B died intestate, in 1817, when C was appointed guardian of B's children, and A his administrator. A paid over to C, as guardian, sums which he used in firm business. In 1819, firm failed, and C assigned his separate and the joint estate to E, for creditors. A reclaimed payments as B's separate estate. D, et al., firm creditors, contested.—A entitled only to dividend for B's advances. Executor or administrator's supervision not condition of firm's continuance, though equitable jurisdiction in Pennsylvania to control trustee. Gratz v. Bayard, 11 S. & R. 41, Pa. (1824).

2. *Executors of a partner do not become partners by leaving his capital in the firm under the partnership contract.* By articles, B & C agreed that they should carry on business until 1870, and that if B died his capital of $20,000 should remain for the benefit of his family. B died in 1866, and D, his executor, left the $20,000 in the business under the contract. A sued D, as a partner, for merchandise bought by the firm after B's death.—D not a volunteer, and exonerated in carrying out his testator's contract. Richter v. Poppenhusen, 39 Howard Pr. 82 (1870).

Executors of a partner do not become partners by leaving his capital in the firm, if directed to do so by his will. B, a partner, directed his executors, who were his co-partners, C, his widow, E and D, by will, not to withdraw his capital from the firm of B, C & Co. D left B's share in the firm, which was continued by C. E joined the firm, and D also signed the articles. C died, and by his will firm continued, his executors, D & E, signing new articles. A, who contracted with the firm after B's death, sued D as a partner.—Not liable. Executor was merely the instrument of the testator, and obliged to carry out the will, or commit a breach of trust. Owens v. Mackall, 33 M'd 372 (1870).

§73.

As the executor, or administrator, may renounce, and cannot be forced to act, he will not be exonerated from liability if he does act as a partner.

The authorities in general, however, do not admit any exception. By them personal and unlimited liability is the incident of a partner, and every person who acts as a partner incurs the liability of a partner.

A man cannot divide himself into parts, and become a partner in one part, or capacity, but not in all. He must enter the partnership as an individual, or a unit. The executor, who represents the deceased partner's estate in the firm, is the only person who could control the destination of the property, or recover it if stolen. His acting in the capacity of executor would none the less be acting, and commit him, as a partner.[1] He is not permitted to qualify his acts, and make them conditional upon his capacity being recognized. The capacity is disregarded, and the individual is held.[2]

As the testator cannot furnish the personal liability, his executor will be charged on the slightest indication that he acts for the testator. If the direction, or agreement is to continue the firm, and the executor does not renounce, he is liable from his position which compels him to carry out the arrangement.

1. *Executors, by leaving the testator's property in the firm, become partners.* The executors left the share of a deceased partner, for the benefit of his daughter, in the firm, which continued the business without changing its name. They accounted to her for the profits, and took no part in the business. A sued them for price of draft ordered by firm.—Liable, because no one else to represent deceased partner, or his interest. Suit could be brought for his share, or indictment for theft of it, only by them. They could not bind infant, or make her a partner. Wightman v. Tonroe, 4 Taunt 412 (1813).

Executors who leave deceased partner's contribution in firm, and share the profits, are lenders, unless they co-operate in the management of the business, when, like others, they become partners. By articles, B, C, D & E agreed to trade as B & Co. for 3 years from 1 November, 1880. If any partner died during the term the balance due him to remain part of the firm capital. At expiration of partnership, contributions to be repaid before profits divided. D died, in July, 1881, and F *et al.* were his executors. D had contributed $15,000. At his death $17,000 stood to his credit, and remained in the partnership until it expired, 31 October, 1883. Surviving partners continued the business. F *et al.* examined the firm books, but did not interfere or participate in the management. In October, 1883, A sold the firm merchandise, and sued surviving partners and executors of D.—Judgment for F *et al.* D's capital remained a loan to the firm. Wild v. Davenport, 7 A. R. 295 (1886).

Acting in the capacity of executor no protection against liability as partner. B, C *et al.*, partners in banking company, each covenanted to answer for business until his executor sold his shares, or his bene-

ficiaries became proprietors. B died, and C acted as his executor in the firm business. No transfer or registration of B's shares. A brought bill against C and the beneficiaries, for debt contracted after B died.—Recovered. The avowal of his capacity does not exempt executor from individual liability. Labouchere v. Tupper, 11 Moore P. C. 198 (1857).

2. *If executor acts as partner under will, or contract, liable as partner.* Stock in City of Glasgow Bank was accepted for *cestuy que trust* by A & B, who had the shares entered to them *as trustees.* The charter contained no limitation of liability, and the bank, which was, in effect, a partnership, failed. A & B, who were charged as contributories in their own right, applied to be classed as representatives, and charged only to the extent of the fund.—Refused. Liable personally, and bank could not accept stockholders with limited liability. Muir v. City of Glasgow Bank, 4 H. L. 337 (1879).

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§74.

In as much as the executor, or administrator, replaces his testator, or intestate, and incurs the personal and unlimited liability of a partner, the amount which he contributes of the decedent's estate may be limited.

The law is on the lookout for the personal liability of somebody, but is satisfied when it has found a substitute for the deceased partner. The representative capacity of the executor is ignored, and the man behind the mask succeeds to the vacant position. Does he necessarily involve the whole estate in the business, as the partner did in his lifetime? That was a consequence of the partner's personal liability. The natural inference is that the whole estate is embarked in the business, as that corresponds with the deceased partner's liability at his death.[1] But at that epoch a legal, as well as a physical, change takes place. The dissolution extends to the partner's legal functions. He becomes a special, and his executor becomes a general, partner.[2] The recipients of the estate take

all the benefits, and the executor bears all the burdens. The law makes the testator a special partner in the firm. As such, he need not let his estate remain subject to the risks of the business, but may withdraw a portion, and limit the amount which the executor shall employ in the firm.[3] The limit may be left to the executor's discretion, which is then personal, and cannot be exerted by any one else. The executor is bound by the testator's direction, and only so much of the estate will be charged with the debts of the firm as the testator has directed to be put in the business. The residue will be distributed without awaiting a termination of the partnership.[4] Any contribution made by the executor in excess of the limit fixed by the testator is a breach of trust, and the property so contributed may be recovered from the firm in preference to other creditors.[5] The creditors of the firm may proceed directly against the testator's estate for satisfaction, so far as it has been pledged by the contribution for the firm debts.[6]

Will the executor be reimbursed out of the deceased partner's estate for the losses which he has incurred on its behalf? The right to indemnity from his estate would, at least, afford the executor only a partial and inadequate relief. His liability is unlimited in extent, and might, as it did in the Glasgow Bank case, sweep away the executor's fortune. The testator's estate, on the other hand, is a limited fund, and might not be sufficient to make up the loss, or meet the outstanding liabilities. Even this *modicum* is taken away when the testator leaves a specified portion of his estate in the firm. The appropriation of a part, it is interpreted, withholds the residue, and the

executor is not allowed indemnity out of the portion withheld by the testator.[7] The executor risks the only fund which is pledged for his relief, in the business, and although he risks it by the testator's command, that fact does not found a claim against the residue of his estate.

The settlement in distribution of an interest in the testator's estate vests the allotment in the beneficiary, and, by withdrawing it from the firm, takes away the executor's claim for reimbursement for any subsequent loss, out of the share.[8]

The creditors of an executor may be subrogated to his position, and assert his right against the testator's estate.[9] Their claim, however, is said to be dependent upon his equity, and if he had debarred himself from exerting his right, or forfeited it, they are precluded by his dereliction, and have no access to the estate.[10] But when that obstacle is removed, the claim is recognized as a direct right against the testator's estate, and entitles the claimants to administration as creditors of the estate.[11]

1. *Contract to continue firm, in spite of partner's death, prevents his restricting by will the liability to a part of his estate.* B, father, C, son, and D, son-in-law, in turning over stock of existing business to new firm, for the purpose of carrying on the business, provided, by articles, that firm should not be dissolved by B's death, but should be continued by his executor until expiration of term. B agreed to contribute $2,500 cash, but stipulated for repayment as soon as firm could spare it, and for interest in cash, after first year, on aggregate contribution. B's contribution amounted to about $41,000. The firm indebtedness to, at least, $85,000. B died shortly after executing articles, and disposed of his whole estate by will, leaving all to C, 1-6 for himself and 5-6 for widow and daughters. C, acting executor, continued business with D, and pledged assets of B's estate held for beneficiaries, to A for discounts. Firm insolvent at expiration of term.—Decree for A. Contract charged B's entire estate, and he could not restrict his liability by a will. Blodgett v. Am. Nat. Bank, 49 Conn. 9 (1881).

2. The *Societas leonina*, or type of an impossible partnership at the Civil law.

3. *Partner may, by will, continue firm and restrict the liability of his estate to his contribution.* B, in 1870, trading with his son, C, as B & Co., by will directed C to continue the business of B & Co. until youngest son 21, or for shorter period if business unprofitable. B charged his contribution with liabilities of firm after his death, but directed that the rest of his estate should not be charged. B died, in 1872, and profits were made and distributed to beneficiaries under the will. In 1877, firm became insolvent, and A appointed assignee. The debts were all incurred after distribution of profits. A sued B's legatees.—Judgment for defendants. Jones v. Walker, 103 U. S. 444 (1880).

4. *Executor reimbursed only out of testator's contribution.* B, testator, directed C, his wife, to carry on his business, and A, his trustee, to advance her £600, taking her note for the advance, and for the value of his stock. He made C and A his executors. C incurred an additional debt of £768, 5*s.* 4*d.* to B's estate, and became bankrupt. A offered to prove for £600, for £1,367, 5*s.*, valuation of the stock, and for £768, 2*s.* 4*d.*—Proof of first two items rejected, because contributed by testator's direction, but of last item allowed, because indemnified only to extent of capital embarked by testator in business. Ex parte Garland, 10 Ves. 110 (1804).

Partner's disposition by will of all his estate, although he directs co-partner to continue firm for unexpired term, limits liability of deceased partner's estate to amount contributed. B & C, by articles, in 1836, entered into partnership for two years. In 1837 B disposed, by will, of all his real and personal estate, adding a codicil, that C should continue firm until end of term. B died in 1837. C carried on business, and failed before expiration of period. A brought bill against C and against B's executor, D, on note of C & Co., given for debt incurred subsequent to B's death. B's residuary legatee, intervened and demurred, on ground that B limited liability of his estate to amount contributed to C & Co.—Demurrer sustained. Burrell v. Mandeville, 2 How. 560, S. C. (1844).

Will may fix period of liquidation, and limit testator's partnership liability to his contribution during liquidation. By will, B directed banking business of B, C & Co., with its present capital, to be continued by C, surviving partner, for 2 years, or period necessary for liquidation, testator's profits being shared by his beneficiaries, and empowered C to transact business as if B were living. A, holding certificate of deposit made after 2 years, brought bill against D, executor and residuary legatee, and C, to charge B's estate.—Judgment for defendants. B's estate liable only for contribution. Authority to C declaratory. Brasfield v. French, 59 Miss. 632 (1882).

5. *Executor's pledge of assets which testator did not contribute to firm not binding.* By his will, B, a partner, directed C, his brother and executor, to continue the firm, and represent B's share, which belonged to three parties. C pledged two notes, for $39,000 each held by B, to defendants, for loans to C on behalf of the firm. A, B's administrator *de bonis non*, reclaimed the notes.—Recovered. The pledge of assets not embarked by B in firm, exceeded C's authority under the will. Smith v. Ayer, 13 Otto 320. S. C. (1879).

Executor does not make co-executors and beneficiaries partners by continuing testator's estate in firm business, nor bind them by pledging his stock for the business. B, father, & C, son, partners. B died, making C, D *et al.* executors. D *et al.* empowered C to act for B's estate. C continued business without changing firm name, and used

B's property, which constituted 2-3 of the assets. C pledged stock of B's estate in bank E, to A, for loans made to firm business. D *et al.* contested A's claim, and E refused to permit transfer.—Judgment for D *et al.* Firm dissolved by B's death, and C could not embark B's estate without D *et. al.'s* consent. A, who knew stock pledged not for administration of B's estate, but for the business, not a *bona fide* holder. First Nat. Bank of Allegheny v. Farmers' Deposit Bank of Pittsburgh, 5 Central Rep'r 505 (1886).

6. *Executor liable first, and then testator's estate.* By will, B directed C, his widow, to carry on his business, unless it should turn out unprofitable. His executors took possession when it proved a loss, and A claimed payment for debts incurred by C.—The stock acquired by C in carrying on the business applied first to payment of her debts, and the deficiency made up out of testator's assets. Hankey v. Hammock, 1 Buck, Cases in Bankruptcy, 210; 3 Madd. 148 n. (b) (1786).

7. *Creditors of executors reimbursed only out of testator's contribution.* B, testator, directed C, his wife, to carry on his business until youngest child twenty-one, and gave her the use of his stock in trade. He authorized D, his executors, to increase the capital in the business in their discretion. D renounced, and C took administration. She failed, and her creditors sought to come in with B's creditors upon his estate, or, at least, be substituted for those whom she had paid out of B's stock.—Refused. None of B's estate liable, except the stock directed to be put in business by the will. Cutbush v. Cutbush, 1 Beav. 185 (1838).

8. *Testator cannot exonerate the executor from liability.* B gave her daughters, C and D, each a legacy of £2,000 for life, with remainder to legatee's children. Testatrix, who held Glasgow bank stock, gave E and F, trustees, express power, in their discretion, to retain the shares without any personal liability for loss. E and F, who allotted the stock to C, and retained it, with her concurrence, as an investment, claimed indemnity for the liability, which they incurred as partners, from D.—Disallowed. Distribution of assets severed the trust, and indemnity limited to investment allotted to C. Liability resulted from act of E and F, and not from anything done by D, who was not interested or compelled. Frazer v. Murdock, 6 H. L. 855 (1881).

9. *Reimbursement limited to amount authorized by will, and subject to that amount, beneficiaries may claim against creditors of executor.* No equity exists in a legatee over a creditor, and the intermediate barrier of an executor's trade, which is only a trust, does not prevent the recourse over. B directed his executor, C, to continue testator's busines of a dairyman for the benefit of his family. C took possession in 1870, and carried on the business in his own name. In 1876 he surrendered the lease, and obtained a renewal in his own name, of the place of business. In 1879 he pledged the lease, for a loan, to A, who did not know of C's being an executor. C used £130 for himself, and £66 for the estate. D, the testator's son, claimed administration. A recovered judgment against C, and levied on the stock and leasehold. The parties consented to a sale without prejudice. A gave up the lease, to effect the sale, but claimed his debt out of the proceeds. His argument: No notice of a trust, and entitled to take the property as C's own. C, also, had authority, as executor, to pledge the leasehold, and A could not be deprived of his legal possession without payment.—Beneficiaries' equity paramount

to A's.—Executor personally liable for continuing testator's business, though entitled to indemnity from his estate, if continued by his will, for debts incurred in carrying on the business for the testator. C acquired no title by trading in his own name, and beneficiaries' acquiescence related to his title as trustee. Executor binds assets only if he deals with them as executor. No execution against him could seize the trust estate, except for £66 used on account of it. Renewal of the lease enured to the trust, and *cestuy que trusts'* equity attached at that date. A's equity arose with the pledge. Court could decree a sale of the freehold without possession of the lease, by adding a condition that the holder was bound by the sale. In re Morgan. Pilgrem v. Pilgrem, 18 Ch. D. 93 (1881).

10. *Creditors of executor no right to estate, except through executor. If executor bars his right of recourse to the testator's estate, creditors who claim through him also excluded.* Unless the executor has intercepted the equity by a default, which bars his right to indemnity when it exists. If he is excluded from the estate by his misconduct, the creditors who are subrogated to his claim are unable to get access to the testator's estate. By will, B directed C, his executor, to let D, a nephew, carry on business, under C's supervision, with D's share, 1-8 of B's estate, and gave D option at majority to take stock or bring it into hotchpot. C carried on the business himself, became in default to the estate, and insolvent. A, creditor, sued C and claimed equitable lien on D's quota employed by B's direction in trade.—No standing except by bill. But C's default barred his right and A's equity to the portion of B's estate embarked in trade. In re Johnson, 15 Ch. D. 548 (1880).

11. *Creditor of executor entitled to administration of testator's estate.* By will, B gave all his estate to C, executors and trustees, to permit D, his widow, to employ the rents and profits in carrying on his business of draper during her lifetime. They renounced, and she took administration *c. t. a.*, continued the business, and died insolvent. A, her creditor, claimed administration on B's estate.—Entitled, as creditor in equity of B. Fairlamb v. Percy, 3 P. & M. 217 (1875).

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§75.

The intention of the partner, and of his executor, determine how, and by whom, the business shall be carried on after a partner's death. The intention must be ascertained, as in all cases, by the acts and declarations of the parties.

If the executor is unwilling to follow the directions of the testator, and carry out his plans, he can renounce the office, and avoid the risks incident to the business. If he does not refuse to undertake the task,

but assumes it, his position must be fixed. Whether he makes himself a partner, or not, can be determined only as the membership of any individual partner is ascertained. The fact that the executor derives no benefit as a partner, but incurs loss as if he were such, although a strong argument against his being a partner is not conclusive. He might be willing to undertake the risk, or he might do acts which would charge him as a partner, in spite of his will.

In the attempt to solve the difficulty of the situation, this view has been taken: The surviving partners continue the business, although the firm is dissolved by the death of a partner, and no break is made in the continuity of the firm transactions. The deceased partner does not withdraw his capital, or direct the business to be wound up; on the contrary, he leaves his interest undisturbed in the business, which he wishes to preserve, in order to secure his share of the profits. He appoints an executor to take charge of that interest, and directs him, in effect, not to interfere with the continuation of the business by the surviving partners. The executor represents the deceased's interest. The testator meant to withdraw from the business as a partner, but he also meant to leave his interest invested in the business, which he refrained from destroying, in order to keep his investment productive. By this arrangement he ceases to be a partner, and becomes a lender, receiving a share of profits, in lieu of interest upon his capital.[1]

It is far more natural for a testator to appoint an executor to take charge of an investment than to undertake a partnership, and carry all the liabilities of the business upon his shoulders, out of pure friend-

ship for the testator. In such a case, the only thing which the executor could own in the business would be its debts. As it seems almost incredible that any executor would assume the task, under such circumstances, he should not be made a partner by construction of law.[2]

There is one way, however, in which he can act with safety, and escape the liabilities of a partner. He can enter into a special partnership, and make the testator's estate his contribution. The statute will protect him, and the decedent's estate will be in the same position as if he had assumed the liabilities of a partner.[3] There is no occasion for his incurring any liability on behalf of the estate.

1. *If executors do not act, but lend, under will, estate not liable nor executors partners.* B, C & D were in partnership, as auctioneers. Articles provided that firm should continue for seven years, and if a partner died during period his executors should take his share. B did die, and subsequently, during term, A commissioned firm to sell mill, and sued B's executors for the proceeds.—Not liable, because no contract by executors. Holme v. Hammond, L. R. 7 Exch. 218 (1872).

   A, B & C, partners, agreed that A might nominate a partner on his death; that £100,000 of his share should be continued in, and be considered part of, the partnership effects; that surviving partner should give bond, to pay said amount, with interest, and permit A's executors to inspect books. A died, and his executors assigned his interest to B & C, taking bond of indemnity against debts. B & C became bankrupt, and A's executors proved for amount due.—Allowed. A's estate not embarked in business, but a creditor. Ex parte Edmunds, 11 D. F. & J. 488 (1862).

2. *Executor, who leaves testator's capital in firm, not liable as partner because he fails to compel immediate liquidation.* B, C & D traded as B, C & Co. B died, and his executor, E, left with them B's capital, which entitled his beneficiaries to share the profits. E knew that business was advertised to continue, but took no part in its management, and repeatedly urged C and D to close the business. The firm became insolvent, and A sued E, as co-defendant, for debt contracted since B's death.—Judgment for E. Avery v. Myers, 60 Miss. 368 (1882).

3. *For fixed term dissolved by death.* A & B contracted partnership for 10 years. Articles gave heirs, or representatives of deceased partners, 3 months to elect to continue association, as general or special partnership; if no election, a special partnership. A died; his representatives made no election within 3 months, and brought

bill for account and receiver. B denied right to dissolve before expiration of term.—Firm could not continue as special partnership, because statutory requirements not observed. Representatives not having elected to continue general partnership, death operated as a dissolution. Surviving partner entitled to wind up business. Jacquin v. Buisson, 11 How. Pr. 385, N. Y. (1855).

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CHAPTER V.

NATURE OF THE CONTRACT MADE BY THE FIRM IN TRANSACTING ITS BUSINESS WITH THIRD PERSONS.

§76.

The partners may be called by a collective name for convenience, except in legal proceedings.

The firm is not recognized in law as a person, and can neither sue nor be sued.[1] The firm is simply an aggregate of individual partners. They are the parties who must be sued.[2] One partner cannot sue for the firm claim; not even if he is the assignee of his copartner's interest.[3] All the original promisees must join as plaintiffs.[4] Nor can one partner be sued alone, but all within the reach of process must join as defendants.[5]

If the firm is organized as an unincorporated association, the articles may provide for suing and being sued in the company name, or in the name of trustees appointed to conduct the business.[6] This is an arrangement binding between the partners. The firm, in its collective name, or the trustees, may sue or be sued by

a partner, provided the claim does not involve partnership accounts.[7]

1. *Firm no standing as a party in U. S. court.* A & Co. averred themselves citizens of Pennsylvania, and petitioned for removal of cause from Iowa state court.—Remanded. Citizenship of each partner requisite to give jurisdiction. Adams v. May, 27 Fed. R. 907, U. S. Cir. Court (1886).

CALIFORNIA. "Associates may be sued by name of Association." "When two or more persons, associated in any business, transact "such business under a common name, whether it comprises the "names of such persons or not, the associates may be sued by such "common name, the summons in such case being served on one or "more of the associates; and the judgment in the action shall bind "the joint property of all the associates, in the same manner as if all "had been named defendants and had been sued upon their joint "liability." Cal. Codes and Stats., 1876, §§388–389.

Common law form, a suit against individual partners in California. A sued B and C, trading as B Bros., defendants, served B, and took judgment by default against him for want of appearance. A moved to amend judgment, and make it a judgment against firm, in order to issue execution against firm assets, as well as separate property of B.—Refused. Suit against individual partners. Judgment authorized by §414, and other partners might be brought in under §§989–994. Fedor v. Epstein, 10 Pacif. R. 785 (1886).

Partnership description surplusage. A and B, having sued as partners trading as B & Sons, and obtained judgment against C, brought suit to set aside prior judgment, and sale under it to D, on account of fraud. Defence: No publication, as required by Cal. C. C., §2466 §2468.—Judgment for plaintiffs. Partnership description surplusage. Lee v. Orr, 11 Pac. R. 745 (1886).

IOWA. "Suits may be brought by or against a partnership as such, "or against all or either of the individual members thereof, and a "judgment against the firm, as such, may be enforced against the "partnership property or that of such members as have apppeared or "been served with notice." Iowa code of 1884, §2553.

NEBRASKA. "Associations—Firms, how named." "Any company "or association of persons formed for the purpose of carrying on any "trade or business, or for the purpose of holding any species of "property in the state, and not incorporated, may sue and be sued "by such usual name as such company, partnership, or association "may have assumed to itself or be known by, and it shall not be "necessary in such case to set forth in the process or pleading, or to "prove at the trial, the names of the persons composing the company." Compiled Statutes of 1885, §24.

"Process—Service." "Process against any such company or firm "shall be served by a copy left at their usual place of doing business "within the county, with one of the members of such company or "firm, or with the clerk or general agent thereof, and executions "issued on any judgments rendered in such proceedings shall be "levied only on partnership property." *Ib.* §25.

"Individual property—How subjected." "If the plaintiff, in any "Judgment so rendered against any company or partnership, shall "seek to charge the individual property of the persons composing "such company or firm, it shall be lawful for him to file a bill in "chancery against the several members thereof, setting forth his

"judgment and the insufficiency of the partnership property to sat-"isfy the same, and to have a decree for the debt, and an award of "execution against all such persons, or any of them, as may appear to "have been members of such company by consent of firm." *Ib.* §27.

Firm a party only by force of statute. Robert Dick & Son obtained judgment against company B, in Nebraska. No resident of county offered as security for costs, nor proof that firm carried on business, or owned property in the state —Reversed. Compliance with statutory requisitions necessary to maintain suit. B. & M. R. R. v. Dick, 7 Neb. 242 (1878).

Common law right unaffected by statute. A, B & C, late trading as A, B & Co., brought suit against D. Demurrer: Plaintiffs no capacity to sue without showing residence and business, or property, in state.—Judgment for plaintiff on demurrer affirmed. Smith v. Gregg, 9 Neb. 212 (1879).

Firm assets must be exhausted before execution against separate partners. A, who recovered a judgment, in Wyoming Territory, against B and associates, and also a judgment against B, C & Co., sued B, C, D, E, F and G, in Nebraska, upon said judgments, as partners in both firms. No proof of Wyoming law, or of insufficiency of firm assets.—Judgment for defendants. Wyoming law assumed to be like Nebraska, and firm property primary fund. Ruth v. Lowrey, 10 Neb. 260 (1880).

Non-observance of statutory requisitions cured by judgment. A & B, non-resident firm, attached corporation and its stockholders, in Nebraska. No objection raised, in any form, to plaintiff's capacity and judgment recovered. On appeal, objection raised.—Affirmed. Objection waived. Cady v. Smith, 12 Neb. 628 (1882).

CONNECTICUT. "In mesne process by or against a co-partnership, "it shall not be necessary to insert the names of the partners, pro-"vided the partnership name is stated; and the plaintiff shall have "the right, within the first three days of the court to which the pro-"cess is returnable, to amend it, without costs, by inserting the name "of the partners; and writs returnable before a justice of the peace "may be amended in the same manner, at any time before the plead-"ings are closed." Conn. Stats., 1875, p. 400, §12.

2. *Partners must sue by Christian names.* A & B recovered judgment. —Error. No Christian names. Seely v. Schneck, Pen. 75 (1806); McCredy v. Vanneman, Pen. 870 (1811); Crandall v. Denny, Pen. 137 (1806); Burns v. Hall, Pen. 984 (1812). Though no evidence that plaintiffs had any Christian names. Tomlinson v. Burke, 5 Hal. 295, N. J. (1829).

3. *Interest of partner in a claim cannot be so assigned to co-partner, that he can sue for the debt in his own name.* A sued B's administrators, on implied assumpsit, for professional services rendered B between 1855 and 1880. During the 25 years, A had been a partner in three law firms, which extended nearly through the entire period. A was assignee of the interests of his late co-partners. B had paid A his fee for conducting trials and controversies on the settlement of each transaction. No pleadings were filed. Defendant's points: Statute of limitations, and plaintiff's suing alone. Verdict for A, $47,000, reduced by court to $35,000.—Judgment reversed. A could not join with his cause of action claims for which he could not sue in his own name. A could not recover for his services as a whole, but only on a *quantum meruit*, as the right to compensation accrued; which, in the absence of agreement, would be from year to year, like any hiring. A's claim barred at all events, except for last six

years. Mosgrove v. Golden, 5 Out. 605, Pa. (1882); citing Horbach v. Huey, 4 Watts 455, Pa. (1835).

4. *Suit in name of claimants.* Claim by A, and others, for debt which B owed A.—No judgment. Though A might be partner, or co-owner with others, claim should show cause of action in plaintiffs. Autin v. Townsend, Pen. 744 (1811).

5. *All partners must be joined, unless out of jurisdiction.* A & B summoned, but C ignored.—Judgment reversed. All may be sued, but non-served must be out of jurisdiction. Ford v. Munson, 1 South. 93 (1818); Smith v. McDonald, 1 South. 103 (1818).

6. *Procedure; joinder of partners.* A subscribed to stock of unincorporated society, under articles which vested whole power of the body in trustees. Trustees sued him for subscription. Defence: a partnership, and all stockholders should have been joined as plaintiffs. —Though a partner, he was bound by his contract, which empowered trustees to sue. Cross v. Jackson, 5 Hill 478, N. Y. (1843), relying on Radenhust v. Bates, 11 Moore 421; 3 Bing. 463.

7. *Agreement of partners enables them to sue a partner in name of a company, and his plea, if in bar, anticipates their case, which might show a cause of action independent of firm accounts.* B, C *et al.*, trading in partnership as a company, agreed to sue and be sued in its name, A. Assumpsit by A against B, for merchandise. Plea in bar: Unincorporated company can't sue, nor can partner sue co-partner.—B estopped by his agreement to deny A's right to sue, and evidence might disclose at the trial a transaction which did not involve partnership accounts. Manufact'g and Mer. Co. of Sandusky v. Schoolly, Tappan 223, O. (1818).

Must an infant partner be a party to the action? It is admitted that an infant partner cannot be charged as a co-defendant. The requirement, that all parties to a joint contract must be made parties to the action, is relaxed in this instance, and the infant, though a co-promissor, is treated as a cypher. It has been held that an infant partner must be made a co-plaintiff, because of his interest in the business, and of a minor's privilege of enforcing contracts beneficial to himself.[8] This is taking only the plaintiff's side in view. The defendant might set up a counter-claim, and obtain judgment upon it, against the plaintiff. The effect would be to charge the infant for a firm debt when he is exempt from liability for it.

8. *Infant partner must join, unless a nominal partner.* A & Son traded as bankers. A, alone, sued C, a customer, for the amount he

had overdrawn his account. C pleaded non-joinder of the son, who was a minor.—Sustained, in default of proof that the son had no property, or interest, as a partner, in the firm. Teed v. Elworthy, 14 East 210 (1811).

Infant partner may join as co-partner in a suit for money lent. B, an adult, & C, an infant, were in partnership. A, C's father, and B sued D for a loan made to D by B & C.—Judgment for D. He made no contract with A, and C is entitled, in a suit for his benefit, to be co-plaintiff with B by the contract of partnership, which is not void, but only voidable. Osburn v. Farr, 42 Mich. 134 (1879).

Must a nominal partner be joined as plaintiff? The answer depends upon the manner of the holding out. If the nominal partner is held out with the knowledge and concurrence of the actual partners, the defendant may compel his joinder as co-plaintiff, in order to make available any set-off the defendant might have against all the partners, including the nominal partner.[9] If, on the other hand, the nominal partner held himself out without the knowledge or concurrence of the actual partners, the defendant could not compel his joinder as co-plaintiff, unless such nominal partner had acted as the agent of the actual partners in the transaction out of which the suit arose.

9. *Supra* §69, note 21.

Should a dormant partner be a party to the action? He may be sued with the ostensible partner.[10] The defendant may compel his joinder as a co-plaintiff, because he is, in fact, a party in interest. Moreover, as the ostensible partners, when sued alone, may, with the dormant partner's consent, set-off his claim against the plaintiff, by parity of reasoning the defendant to a suit by the ostensible partners, should be permitted to set-off the full amount of a claim which he might have against them, together with the dormant partner,[11] although the obligation was not incurred in the course of the firm business. But if this be not admitted, the defendant certainly has the right to set-

off such proportion of his counter-claim as corresponds to the number of ostensible partners. But as the action is really prosecuted for the benefit of all, including the dormant partner, the defendant should be entitled to compel his joinder, in order that the entire set-off may be made available. The ostensible partners cannot compel a firm creditor to make the dormant partner a co-defendant. They are liable on the contract as made.[12] In England, the failure to plead the non-joinder of the dormant partner in abatement, is treated as an election, although the defendant did not know of his connection with the firm.[13]

10. *Dormant liable with ostensible partner.* B bought merchandise. A sued B & Co. for price.—Recovered. Crary v. Williams, 2 Ohio 65 (1825).

11. *Dormant may sue as surviving partner, and defendant set-off firm debt.* A dormant and B ostensible partner. C gave B note for merchandise. B died, and A sued C on the note. He set-off firm debt to him.—Action maintained. Set-off against A, as surviving partner. Beach v. Hayward, 10 Ohio 455 (1841).

12. *Unknown dormant partner need not be joined as co-defendant.* A sued B on his warranty of two horses, sold in his own name to A, who did not know C was a dormant partner. Defence: Non-joinder of C.—Recovered. Contract with B, and A need not join C as co-defendant, because he did not contract with, or know C was B's dormant partner. Cookingham v. Tasker, 2 Keyes 454, N. Y. (1866).

Dormant partner need not be wholly unknown and inactive. B, C and D did business as B & C. Active members never stated that D was a partner, and he rarely appeared at the store, though he admitted, in borrowing money for the firm, that he was a partner; but his connection was not generally known in the community. Business cards, with his name as a partner, were printed, but not issued. A, who was agent of the firm, and ignorant of D's membership, sued B & C. Defence: Should have joined D.—Recovered, because D a dormant partner, and unknown when advance made. Dormant partner need not studiously conceal his connection, nor wholly abstain from the business, nor be absolutely unknown as a partner. North v. Bloss, 30 N. Y. 374 (1864).

Money paid to one partner, with knowledge that there were other partners, gives right to a separate action. B, C & D bought coal land, for $17,000. B employed E to solicit A to join them in buying the land. E represented that the price was $50,000, and, on that basis, A contributed $1,000; $400 would have been his quota if price $17,000. A sued B for obtaining money on false pretence, and for money had and received. Defence: C and D should be co-defendants in assumpsit, as they received a portion.—Recovered. Count for tort disregarded. C and D need not be joined, because,

like dormant partner, unknown to A. Lesley v. Wiley, 47 N. Y. 648 (1872).

13. Kendall v. Hamilton, *infra* §77, n. 3.

Enactment of rule that parties in interest must join makes it inflexible. N. Y. Code of Procedure, §1111.

Dormant partner must join as co-plaintiff. A sued C for firm claim. Defence: Non-joinder of dormant partner, B.—Judgment for C. Code requires joinder of all parties in interest. Secor v. Keller, 4 Duer 414 (1855).

Should a special partner be a party to the action? He need not join, though he may do so, if he chooses, on account of his ultimate interest in the disposition of the firm assets upon dissolution.[14] There is no reason to join him as co-defendant, because his liability is limited to his interest in the firm assets, and may be seized to satisfy a judgment against the general partners.

14. *Special partner a proper, though not a necessary, party to firm suits.* Firm creditors sued general partners for injunction and receiver. Defence: Non-joinder of special partner.—Decree. Notwithstanding statute directs suits to be brought in name of the general partners, the special partner is a proper party, because he has an interest in the ultimate disposition of firm property, but not a necessary party, because he holds no firm property. Schulten v. Lord, 4 E. D. Smith 206 (1855).

If trading under a fictitious name is made a penal offence by statute, can the firm recover on its contracts? It is probable that the firm cannot sue if the contract in question was made in the course of its business.[15] But if the contract is merely incidental to the business of the firm, and of such a nature that no credit could have been given to the firm name, it is not invalidated by the statute.[16]

15. "§1. No person shall hereafter transact business in the name of a "partner not interested in his firm, and where the designation 'and "company,' or '& Co.' is used, it shall represent an actual partner "or partners."

"§2. Any person offending against the provision of this act, shall, "upon conviction thereof, be deemed guilty of a misdemeanor and "be punished by a fine not exceeding $1000." Ch. 281, N. Y. Laws, 1833.

Wife's answering for 'Co.' in husband's firm not violation of statute against fictitious names. A & Co. sued B for price of merchan-

dise. Defence: 'Co.' represents A's wife, and married woman could not be partner of her husband.—Judgment for A & Co. Wife a real, not a fictitious, person. Zimmerman v. Erhard, 83 N. Y. 74 (1880).

Statute does not prevent firm's offering credit by fictitious name. A Bros. & Co., book-publishers, of New York city, employed B, as canvasser at Buffalo, who executed a bond, with two sureties, C and D, to J. A & C. A, for performance of his contract. B failed to account for proceeds of his sales, and A Bros. & Co. brought suit on the bond. C's defence: Firm designation a violation of statute.—Judgment of non-suit reversed. Statute aimed at credit obtained by fictitious name. Gay v. Seibold, 97 N. Y. 472 (1884).

16. *Right to firm property not destroyed by trading under an unlawful name.* New York statute forbids trading under a fictitious name. A and B traded as carriage makers in the name of A Bros. B retired, and A continued. He shipped a carriage, marked A Bros., by C's road, and sued for damage done to it in transportation. Defence: A engaged in unlawful business.—Recovered. Statute meant to protect persons dealing on the credit of the firm. Carrier deals on the credit of the goods shipped. Wood v. Erie R. R., 72 N. Y. 196 (1878).

Fictitious name does not prevent firm suing for rent. A, B & Co., a Philadelphia firm, with a branch in New York, let a portion of their building in New York to C & Co., for 9 months, at $100 a month. C & Co. left at end of 4 months. A, B & Co. sued them for rent for balance of term. Defence: B dead, and plaintiffs transacting business under fictitious name.—Judgment for A, B & Co. Lease not part of firm business. Sparrow v. Kohn, 3 E. R. 293 (1885).

The Civil code of California provides that persons transacting business in that State under a fictitious name, or description which does not show the names of the parties, cannot sue until they have filed and made formal publication of a certificate of the parties' names and residences.

17. *Certificate of partnership not required for action of tort.* Firm A & Co. sued B, constable, for conversion of crop raised by A & Co. on leased land, on an execution for the debts of C, the landlord, who was employed, as farmer, by A & Co.—Judgment for A & Co. Ralph v. Lockwood, 61 Cal. 155 (1882).

Firm which has not filed or published certificate, may assign a claim. B & Co., never having filed or published certificate required by C. C., §2468, assigned a claim to A, who sued C. Defence: Assignment made to evade said section.—Judgment for A. Cheney v. Newberry, 67 Cal. 126 (1885).

Certificate a prerequisite of suit by firm. Firm sued for price of merchandise, and alleged the filing of a certificate, required by C. C. §2468. Denial, and certificate produced did not comply with statutory requirements.—Non-suit. Sweeney v. Stanford, 67 Cal. 635 (1885).

Certificate must precede suit. A & Co. sued B on promissory note, payable to A & Co. After bringing suit, plaintiffs filed and published certificate required by statute. Judgment for plaintiffs.—Reversed. Action cannot be begun until certificate is filed. Byers v. Bourret, 64 Cal. 73 (1883).

What is the effect of trading in an individual partner's name? The presumption in Pennsylvania is, that commercial paper is given for the firm business;[18] in England,[19] and generally[20] there is no such presumption, but the paper indicates, according to its form, an individual transaction until the contrary is proved. The presumption of a firm transaction may, however, be rebutted by evidence that the paper was used on individual account.[21]

18. Where a firm transacts business in the name of one of the partners, is a promissory note in his name *prima facie* his individual note, or is it chargeable to his firm? It has been decided in Pennsylvania that, in the absence of evidence, the presumption of law is, that the loan was made on the credit of the partnership business.

Commercial paper in individual partner's name, if also firm name, presumed to be for firm. Nathan and Newberry Smith, partners, carried on business in the name of 'N. Smith.' Nathan's business, whether for himself or for the firm, was done under the same name. Nathan drew two checks on a bank, C, for $150 each; the father of one of the partners drew a note for $600, payable to, and endorsed by, N. Smith; and Nathan drew a note for $1,150, which was endorsed by the father. Nathan then deposited these checks and notes as collateral security. He borrowed $1,500 from A, and, at the same time, drew a check on a bank, D, for $1,500, payable to himself, or bearer. Afterwards, he drew a check on the same bank, D, for $2,000, payable to bearer, on which A lent him $1,500. On this check, $288.35 remained due. A's total claim was, therefore, $2,-088.35 on all the checks together. A brought suit for this amount against Nathan and Newberry, as partners. Defence: That they were not liable as partners.—Recovered. ROGERS, J., charged (*inter alia*): "It is the opinion of the Court that," the loan, "is to be "considered as made on the faith and credit of the regular lumber "business in which," Nathan Smith, "was engaged, and not on ac- "count of any speculation in which he may have been concerned "on his own account." That is the presumption. Mifflin v. Smith, 17 S. & R. 165 (1827).

Supra.

19. *Transaction not less individual because partner traded as firm in his individual name.* A sued firm upon two bills, one accepted and endorsed, and the other endorsed by Wm. Beaston, who traded in company with C, under the individual name of "Wm. Beaston." There was no evidence to charge the firm, except the address of the bills, at the works.—Judgment for defendants. The individual name prevails in default of evidence to show a partnership transaction. Yorkshire Banking Co. v. Beaston, L. R., 4 C. P. D. 204; 5 Id. 109 (1880).

20. *Firm trading in indvidual name.* Firm business done in B's name; note given by B.—Presumption an individual transaction. Oliphant v. Matthews, 16 Barb. 608, N. Y. (1853).

21. *If partner's name firm designation, slight evidence of individual, sufficient to rebut presumption of, firm transaction.* B carried on a limited partnership, in his individual name, with C and D, two non-resident partners, and also settled up the business of a prior firm, of B & Co. The firm failed, and assigned to E for creditors. A claimed for loans made on memoranda, notes and checks, all signed 'B.' Auditor upon the evidence found that A's claim arose out of transactions with B & Co., or individual transactions with B, and rejected claim against firm assets.—Judgment affirmed. Burrough's Appeal, 2 Casey 264, Pa. (1856).

Suppose the individual name was the designation of two firms. The plaintiff would have a *prima facie* case against each firm, and he might prove which firm actually received the consideration, although he had designated the wrong firm in his suit, the description being surplusage.[22]

22. Bank v. Dakin, *supra* §44, n. 5.

How do separate creditors stand in reference to a firm which has for its trade-name the individual designation of a partner? They rank as joint creditors, and are entitled to take the firm assets in execution.[23] This position is consistent with none but the Pennsylvania view, which, in such cases, makes all transactions in the individual partner's name firm business.

23. *If firm in individual partner's name, his separate creditors rank as firm creditors.* B traded in his individual name, and A was his dormant partner. B confessed judgment for his individual debts, and sheriff took firm assets in execution. A asked for injunction. Judgment-creditors claimed right paramount to dormant partner over firm assets.—Injunction refused. Separate creditors of active partner rank with joint creditors, where he conducts firm business in his individual name, because creditors know nothing of a firm. Cammack v. Johnson, 1 Gr. Ch. 83, N. J. (1839).

Can a partnership exist without a firm name? Yes, and suit would be directly against the partners, as co-contractors. Suit must always be brought against them, even where they have a firm designation.[24] If

no name had been adopted, a partner could select one, and use it as the trade-name to bind his co-partners.[25]

24. McGregor v. Cleveland, *supra* §44, n. 6.
25. Austin v. Williams, *supra* §44, n. 7.

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§77.

The procedure of the Law Merchant in partnership cases was not introduced at the Common law.

Partnership, introduced into the Common law with the advent of commerce, was said to be a part of the Law Merchant, and to be governed by its provisions. The assertion is not founded on fact. The common lawyers did not dream of adapting the process to any foreign system, or think it worth while to inquire what the Law Merchant was.

The simple object of the Civilians was to obtain satisfaction for a claim against a firm, and they naturally enforced the right against the firm assets, and against the separate partners. The remedies did not exclude each other, but were concurrent, or cumulative.[1] At this late day, the common lawyers are still groping about, in search of a remedy which will enable them to procure satisfaction, and not tie them up, like mummies, in the process. For this purpose, an effort is being made to introduce the Civil law procedure, but, thus far, the construction given to the enactment has frustrated its purpose.[2] No desire is evinced to ascertain the Civil law method, and to interpret the statutory language, in accordance with the process enacted for the purpose of superceding the

Common law practice. On the contrary, the Common law formula of a joint contract is retained, and worked into the Civil law process, which is thereby rendered as useless as the old method.[3]

1. The process of the Civil law may be illustrated by the German practice, which, like ours, regards the firm as but a short name for the partners, who are liable to the extent of their resources. The judgment in a suit against the firm is, in the first instance, limited in execution to the joint assets, but may be enlarged and extended to the individual partners; when execution upon it may issue against their separate estates. The partners can make no defence to the judgment. It is only when, for a reason peculiar to himself, the judgment would not affect a partner that he can establish an exception to the operation of the judgment, and relieve himself and his separate estate from liability.[a] A suit also lies against the partner, or partners, and, upon a judgment, execution will issue directly against the separate estates. The remedies against the firm, and against the partners, are concurrent, and may be combined; they are not self-destructive, and do not exclude each other by merging the claim.[b] The fact is kept in mind that the object of the creditors is not the triumph of a judgment, but a satisfaction of the debt.

a. „Der Gläubiger hat mithin völlig freie Wahl ob er zunächst einen einzelnen „Gesellschafter unter seinem Namen oder ob er alle unter der Firma der Gesell- „schaft belangen will. Thut er das Letztere, so lassen sich durch die Ein- „lassung unter der Firma sämmtliche Gesellschafter ein. Das Erkenntniss „bringt also res judicata allen Gesellschaftern gegenüber hervor. Der „Gläubiger, welcher ein obsiegliches Urtheil erhält, kann mithin entweder „Execution in den Handlungsfonds verlangen oder eine Klage gezen den „einzelnen Gesellschafter anstellen, welche insofern als actio judicati „dezeichnet werden kann, als der Klaggrund das die Gesellschaft verurthei- „lende Erkenntniss ist. Der mit dieser Klage belangte Gesellschafter kann „seine Passivlegitimation. d. h. seine Eigenschaft als Gesellschafter, bestreiten „und die Verjährungseinrede aus Art. 146 geltend machen, außerdem stehen „ihm gegen die Judicatsforderung nur zu die Einreden aus seinem speciellen „verhältniss zum Gläubiger, z. B. die exceptio compensationis, „pacti etc." Commentar zum Allgemeinen Deutschen Handelsgesetzbuch, Art. 112, §.7, pp. 403–4. Dritte Auflage, von Dr. Friederich Von Hahn, 1879.

b. „Wie demnach die Klage des Gesellschaftsgläubigers gegen die Gesellschaft „als solche, und die Klage, welche jenem aus einer Gesellschaftsschuld gegen „den einzelnen Gesellschafter zusteht, aus einander gehalten werden müssen, „so unterscheiden sich im Falle einer Condemnatiou auch die Executions-

„Objecte, indem die auf eine Klage der letztgenannten Art ergangene Verurtheilung nur auf das Privatvermögen des betreffenden Socius, das gegen die Gesellschaftsfirma gefällte Erkenntniss allein auf das Societätsvermögen zum Vollzuge gebracht werden kann.

„Doch ist es möglichh, das aus Einer Gesellschaftschuld zugleich mit der Gesellschaft einzelne order alle Gesellschafter ausgeklagt werden. Ergeht nun auf eine solche sowohl an einen Vertreter der Societät wie an die einzelnen socii zugestellte Klage ein Erkenntniss, welches zugleich mit der Firma die mitverklagten Gesellschafter condemnirt, so kann die Zwangsvollstreckung auf den Societätsfonds so wie auf das Privatvermögen der mitverurtheilten Genossen ohne Weiteres Statt haben." Renaud, Das Recht der Commaditgesellschaften, pp. 386–7.

2. "PARTIES." "Any two or more persons claiming or being liable "as co-partners may sue or be sued in the name of their respective "firms, if any; and any party to an action may in such case apply by "summons to a judge for a statement of the names of the persons who "are co-partners in any such firm, to be furnished in such manner, "and verified on oath or otherwise, as the judge may direct." Order "XVI., rule 10.[c]

"SERVICE OF WRIT." "Where partners are sued in the name of "their firm, the writ shall be served either upon any one or more of "the partners, or at the principal place, within the jurisdiction, of "the business of the partnership upon any person having at the time "of service the control or management of the partnership business "there." Order IX., rule 6.

"APPEARANCE." "Where partners are sued in the name of their "firm, they shall appear individually in their own names, but all "subsequent proceedings shall nevertheless continue in the name of "the firm." Order XII., rule 12.

"EXECUTION." "Where a judgment is against partners in the "name of a firm, execution may issue in manner following:

"(a) Against any property of the partners as such.

"(b) Against any person who has admitted on the pleadings that "he is or has been adjudged to be a partner.

"(c) Against any person who has been served as a partner with "the writ of summons, and has failed to appear.

"If the party who has obtained judgment claims to be entitled to "issue execution against any other person as being a member of the "firm, he may apply to a court or a judge for leave so to do; and "the court or judge may give such leave if the liability be not dis- "puted, or, if such liability be disputed, may order that the liability "of such person be tried and determined in any manner in which "any issue or question may be tried and determined." Order XLII., rule 8.[e]

3. *A several contract not involved in firm contract.* A accepted drafts for B & Co., and, upon the firm's failure, recovered judgment for the amount advanced to pay the bills. Subsequently, in bankruptcy proceedings, A learned that C was a partner, and after receiving, from the joint assets, dividends, brought suit against him for the debt, less the dividends received. C claimed that the judgment merged the cause of action.—No recovery. Joint contract, which limited A to a single remedy. C, if an undisclosed principal, not liable, unless discovered. Kendall v. Hamilton, 4 Appeal Cases 504 (1879).

Judgment against firm merges claim and releases partner not made defendant. A sued B & Co. for libel. Defendant appeared as B, trading as B & Co. A proceeded against B, as the firm, and took

judgment by consent. Hearing that C was B's partner, A moved to amend judgment, and make C co-defendant.—Refused. A no equity. Lord SELBORNE: Judgment by consent operates as unconscious release by A of C. Lord BLACKBURN: A might set aside judgment and start pleadings afresh. Lord FITZGERALD: Judgment fixes B's liability, which could not be re-judged. Munster v. Cox, 10 Appeal Cases 680 (1885).

Judgment against one joint contractor extinguishes claim against co-contractor. A sued B & Co., composed of B and C, for merchandise. After delivery of goods, firm dissolved. A, not knowing of dissolution, drew on B & Co. for price. B accepted for B & Co. Part payment, and suit for balance, and judgment obtained by default. Unable to obtain satisfaction, A sued C, who set up judgment against B for same cause as a bar.—Judgment for C. Judgment merged cause. Chambefort v. Chapman, 19 Q. B, D. 229 (1887).

Comment: "Why under any rational system of law should an "unsatisfied judgment against X relieve Y from a joint liability? "This is a question easier to ask than to answer. The judges who "decided Kendall v. Hamilton did not profess to answer it." 3 Law Review 483 (1887).

Claim still single and judgment a merger. A sued B, who applied, under Order XVI., r. 11, for joinder of C and D, his co-partners. Court refused.—Reversed. The judgment against B would merge claim, and operate to release C and D under joint contract theory, which still subsists, despite the Judicature Act, and the Orders under it. Pilley v. Robinson, 20 Q. B. D. 155 (1887).

c. *Judgment against firm must bind all its members, including partner not served or appearing.* A sued Jno. B & Sons for wrongful execution upon his property, and effected service upon Geo. B. All partners appeared, except Jas. B. A moved for judgment against Jas. B, for want of appearance.—Refused. Judgment must follow the writ, and go against all partners. Jackson v. Litchfield, 8 Q. B. D. 474 (1882).

d. *Judgment against firm binds only partner served.* A brought suit, immediately after B's retirement, against firm, which continued business under old name, and, after service upon some partners, obtained judgment by default. A petitioned to put B in bankruptcy, as partner, though he had not attempted to execute judgment against B under Order XLII, r. 8, which authorized court to try his liability.—Dismissed. No judgment affecting B. Dissent: Judgment binds all who were partners when the debt was incurred. Ex parte Young, 19 Ch. D. 124 (1881).

e. *Judgment against firm binds a partner who is not served, except as to a defence peculiar to him.* B, C and D traded as B & C. C endorsed the bill in suit to A, for a transaction unconnected with firm business. D retired, and B and C continued business. A sued B & C. Judge, for jury, found as a fact that A meant to sue B & C, not B, C and D, trading as B & C.—Judgment for D. Had A meant to include D, summons, like *sci. fa.* to show cause why execution on judgment should not issue against D. He could make a defence personal to himself, though not to original action. Davis v. Morris, 10 Q. B. D. 436 (1883).

But the Common law remedy is not superceded.

Action lies on judgment against firm to charge non-served partner. A sued firm, B & Co., and recovered judgment for price of merchandise. A sued defendants on judgment, alleging their joint and sev-

eral liability for debts of B & Co. Defendants demurred, because Order XLII, r. 8, provides for issue to try partners' liability for judgment.—Judgment for A on demurrer. Order does not supercede action on judgment, in which defendants might deny being partners. Clark v. Cullen, 9 Q. B. D. 355 12.

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§78.

The contract made by the partners in firm transactions is joint in form, but several in substance.

The basis of the partnership structure is the contract which the partners make for the firm in transacting its business. What is the character of this contract? It is an aggregate of contracts, as the firm is an aggregate of partners. The joint form corresponds to the firm which exists only in its parts.

The severability of the contract appears in the liability upon it of each partner to the extent of his resources. The liability is recognized in substantive law, and is denied only in procedure. The moment a judgment against the partners is recovered, execution may issue against each, any or all of them, until satisfaction is obtained. The execution against one is no answer to an execution against the others.[1] Apart from mesne process, the liability is several as well as joint. In equity, and in bankruptcy, where there is no formal procedure, the liability of each partner's separate estate for the firm debts, is enforced without hesitation. One separate commission does not exclude a second, nor does a joint commission prevent recourse to the individual partner.[2]

1. *Firm creditor's right to proceed against separate estate will not be controlled in equity, except for fraud.* C obtained judgment against firm A & B, and levied on partnership land. He also levied on A's

land lying in a different county, which A had conveyed to D, as security for a loan. A and D enjoined C, on the ground that firm land was sufficient to satisfy his debt, and that co-partners colluded with C to defraud A.—Injunction continued, because averment of fraud was not denied by co-partners. But creditor's right admitted to proceed against separate, as well as joint, estate of partners. Wisham v. Lippincott, 1 Stock. 353, N. J. (1853).

2. "Formerly it was the practice for the creditor of a firm of several "partners to take out separate commissions against each partner, as "well as a joint commission against the whole firm; the object being "to distribute the assets of the firm under the joint commission, and "the separate assets of each partner under the separate commission "issued against him. The modern practice, however, is different; "for now under a joint adjudication against a firm, not only are the "assets of the firm distributed amongst its joint creditors, but the "separate assets of each partner are also distributed amongst its own "separate creditors." 2 Lindley 1140; The Law and Practice of Bank-"ruptcy, by ORLANDO F. BUMP, 5th ed. p. 53 *et seq.*, 1872.

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§79.

A new formula was not devised to embody the obligation of partners.

Upon the introduction of partnership into the Common law, a new form was required, to express the new undertaking and embody the partners' contract. But the courts preferred to take what they had at hand. They took the old formula, and made it answer for the occasion, without introducing any variation, or adapting it to the new subject-matter. The joint obligation was the uncouth form, which was turned to account and held to express the firm contract. This kind of obligation never did correspond to any business transaction,[1] and, in place of it, the continental Countries, which were foremost in trade, have, from the earliest times, recognized a commercial contract.[2] The commercial contract has at last become, with us, the real exponent of the partners' status.

1. Speaking of the effect, WOODWARD, J., said: "The technical rule "of the common law * never had regard to the substance of the "contract but only to the remedy upon it." "Here according to the "strict rule of the common law there would be a clear right without "a remedy." "There never was any equity or natural justice in "such a rule." Bowman v. Kistler, 9 Cas 111–2, Pa. (1859).

2. The process has been described *supra* §77. The commercial contract, which charges each partner with unlimited, or *in solido*, liability, existed among the Romans, but was not the ordinary partnership contract.[a] In modern times the exception has become the rule. The commercial codes of Countries which follow the Civil law, establish an *in solido* obligation.[b]

a. The civil codes describe the ordinary partnership.

Louisiana C. C. 2874: "Ordinary partners are not bound *in solido* "for the debts of the partnership, and no one of them can bind his "partners, unless they have given him authority to do so, either specially or by the articles of partnership."

If two partners, each liable to plaintiff for half the debt. A sued B for work on his plantation and on his steamer, done at C's request. The evidence showed that B & C were partners.—Recovered half the debt, under the code. Logan v. Cragin, 27 La. An. 352 (1875).

b. The commercial codes describe the trade partnership, which also exists at the Common law.

La. C. C. 274. Ordinary partnership. "Commercial partners are "bound *in solido* for the debts of the partnership."

„Bei den Handelsobligationen werden die Mitschuldner als solidarisch „vermuthet, wenn nicht darin eine entgegenstehende Vereinbarung getroffen „ist." 3 Borchardt, Handelsgesetze des Erdballs. Italy C. C. §40, p. 213. French Com. Code, §22, 2 *Ib.* p, 533.

„Die Gesellschafter haften für alle Verbindlichkeiten der Gesellschaft „solidarisch und mit ihrem ganzen Vermögen. 2 *Ib.* German Empire C. C. §112, p. 330; *Ib.* §280, p. 363.

„Die Wirkungen der Solidarität zwischen den Gläubigern sind: daß „jeder der Glaubiger das Recht hat, die Gesammtzahlung der Forderung zu „verlangen." 5 *Ib.* Uruguay C. C., §267, p. 39.

Die Wirkungen der solidarischen Haftung zwischen den Schuldnern sind:

„Daß der Gläubiger das Recht hat, den Gesammtbetrag der Forderung „von demgenigen Schuldner zu fordern, welchen er wählt, und welcher verpflichtet ist, ihm das Ganze zo bezahlen, ohne daß er das Recht der Theilung unter den übrigen Schuldnern beanspruchen kann." 5 *Ib.* Argentine Republic, §268, p. 46.

„Der Gläubiger kann nach seiner Wahl von allen Solidarschuldnern oder „von einem derselben das Ganze oder nur ein Theil fordern. Auch im letzteren Falle bleiben sämmtliche Schuldner so lange verpflichtet, bis die ganze „Forderung getilgt ist." 4 *Ib.* Switzerland, C. C., §163, p. 696.

„Diejenigen, welche der Gesellschaft nicht angehören und ihre Namen in „die Gesellschaftsfirma einfügen, werden der solidarischen Haftbarkeit unterworfen, unbeschadet der etwa Platz greifenden Strafe." 5 *Ib.* Spain, C. C. §126, p. 25.

§80.

The courts did not re-model the Common law process, in order to adapt it to firm transactions, and, at last, the legislature intervened to rectify the procedure.

The firm contract, however, became identified with the joint contract of the common law, and the principles of partnership were worked out on the rack of this formula. The amalgamation, as it admittedly worked injustice, was not effected without a protest. A great commercial lawyer, like Lord MANSFIELD, who could not bring himself to the conviction that he was not a moral being, but only an intellectual machine to grind out the law as he found it, good, bad or indifferent, tried to re-model the formula and convert it into an equitable process.[1] His decision started a revolution in the procedure, but professional tradition was inveterate, and stayed for generations the beneficent ameliorations which he foreshadowed.

It was not until common sense compelled the legislature to intervene, and to keep on intervening, that the firm contract was permitted to create its own form.[2]

1. *Non-joinder of partner as defendant waived unless pleaded in abatement.* A sued B, who non-suited plaintiff on evidence at the trial that he had not joined B's partner, C, as co-defendant. On a rule to take off the non-suit, argument: B waived defence of C's non-joinder by not pleading it in abatement.—New trial awarded. Rice v. Shute, 5 Burr. 2611 (1770).

2. This change has been accomplished by statute.
"In trials of actions * brought by partners * it shall not be necessary for the plaintiff in order to maintain any such action, to prove "the co-partnership of the individuals named in such action, or to "prove the Christian or surnames of such partners * but the names "of such co-partners * shall be presumed to be truly set forth * "provided that nothing herein contained shall prevent the defendant "from pleading in abatement, as heretofore, or of proving on the "trial that more persons ought to have been made plaintiffs." Colorado Stats. of 1885, §5.

"Any one of the associates or his legal representative may be sued "for the obligation of all." Alabama Code of 1876, §2904.

"In all cases of joint obligations and joint assumptions of co-part- "ners * suit may be brought and prosecuted against any one or more "of those who are so liable." Kansas Compiled Laws of 1885 (1078) §4.

"Suits may be brought by or against * * all or either of the indi- "vidual members." Iowa Code of 1884, §2553.

Nor does the judgment merge the firm claim or debt.

"An action or judgment against any one or more of several per- "sons jointly bound, shall not be a bar to proceedings against the "other." *Ib.* 2550.

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§81.

The joint process extinguished the several liability of the partners.

Look at the Common law, and see how it frustrates, at every turn, the design of the partners. They were treated as making a joint contract. The law admitted that the firm contract was the several contract of each partner, and enforced performance against any partner. But, though each partner is liable for the whole debt, the creditor was not permitted to sue him in a separate action. Had this been allowed, subject to the defendant's right to compel a joinder of the co-partners, for his protection, the confusion, which produced a chronic miscarriage of justice, would not have arisen. A joint process was, however, required, in order to make the action correspond, in form, to the contract,[1] and a judgment against any partner on account of the form, extinguished the claim against all.

This construction enabled a co-obligor to defeat the claimant's remedy by confessing judgment. If the claimant went on to trial against the other obligors, and obtained judgment, it could not stand, but would

be arrested, because the cause of action, being joint, is merged by a judgment against a single obligor, as his defence corresponds to the claim, and covers the total amount of the obligation.[2] Conversely, the obligor's confession of judgment to a partner would merge the firm claim, and for the same reason.[3] The whole debt is due to each partner who represents the firm.

Not only must the suit be joint, but service must be effected upon all the obligors, at the cost of releasing those who are not served. In England, where the plaintiff had sued all the partners, but could not effect service upon all of them, he might proceed to outlawry against such as were not served, and having thus subjected their goods to his claim, recover judgment against the others. In Pennsylvania, there never was any process of outlawry. If only one partner could be found, and he was served, the others, after judgment against him, could not be touched. The pursuit by the plaintiff of his remedy defeated his right.[4]

1. *Both partners must be joined as defendants in a suit for value of plaintiff's property which they refuse to return.* A sued for a stove lent to B, which he refused to return on demand. B set up, in his answer, the non-joinder of his partner, C. Judgment for A, on the ground that the action was trover, and in tort plaintiff could sue either wrong-doer.—Reversed. Action *ex contractu*, because plaintiff claims the value of the stove as a debt, and judgment would not justify defendant's arrest on a *ca. sa.* Slutts v. Chafee, 48 Wis. 617 (1880).

2. *Judgment confessed by partner bars recovery against co-partner.* A sued B & C on a joint contract. B confessed judgment for $2,631.19, and A obtained verdict against C, who went to trial, for $1,522.88, and entered judgment. A's argument: C waived effect of B's confessed judgment by going to trial, and difference of amounts no reason against A's claim.—Arrested. Judgment against B final, and merged cause of action, which was joint. Two judgments couldn't stand, either both separate or one joint and other separate; nor could joint judgment be for different amounts. B entitled to C's defence. Williams v. McFall, 2 S. & R. 280, Pa. (1816).

Judgment on a firm claim must be against all the partners. B, C & D formed a partnership, in January, 1869, for four years, to manu-

facture wine, and traded in B's individual name. A sold the firm casks. April, 1873, B paid part, and gave his note for the balance, of the debt. April, 1874, A found out that C and D were partners of B, and sued the three for the firm debt. Judgment was entered against B, by default, on the note, for $791.77, and, after a trial on the merits, against C and D on the claim. Appeal: Judgment against B merged the cause of action, and discharged C and D.—Reversed. Two judgments, for different amounts, on the same claim cannot stand. Judgment against B entered without authority, and void, because on a joint claim. But judgment against C and D void, because B not included in it. Curry v. White, 51 Cal. 185 (1885).

3. *Judgment confessed to partner merges firm claim.* B confessed judgment to A, for price of goods bought of A's firm. B moved to set aside judgment and execution, because A's partners not joined. —Refused. B discharged from liability to them. Chapin v. Clemitson, 1 Barb. 311, N. Y. (1847).

4. The procedure frustrates the purpose for which it exists, and annihilates the rights it was devised to protect.

Judgment recovered against partner, after failure to effect service on co-partner, releases him. A sued B & C on a joint bond. B was served, but C returned *non est inventus.* Judgment obtained against B. A subsequently sued C, who pleaded merger of bond in judgment.—Barred. Neither obligor could be sued on the bond, which was extinguished by the judgment. Return enabled A to go on against B, without proceeding to outlawry against C. as in England, where his estate would go in satisfaction. A lost his remedy by pursuit of it. Downey v. F. & M. Bank, 13 S. & R. 288, Pa. (1825).

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§82.

The legislature of Pennsylvania partially corrected this abuse of legal process, by preventing, in joint actions, the judgment against the partners served from merging the claim against others.

At an early date, the legislatures of various states set about to correct this abuse of legal process.[1] A statute of Pennsylvania, enacted,[2] section 1: "In * "suits against co-partners * if the writ or process * "is not served on all the defendants, judgment may "be obtained against those served, but it shall not be "a bar to recovery in another suit against defendants "not served." By section 2, a confessed is assimilated

to an adverse judgment, and does not prevent recovery against the non-confessing partner. A statute of Michigan made a similar provision.[2]

1. "No judgment rendered against a part only of the defendants in "an action upon a joint contract shall be a bar to any future action "on said contract against such of the defendants upon whom or "whose estate the suit in the original action shall not have been "served." Rhode Island Public Stats. of 1882, §29.

"If the name of one or more partners shall, for any cause have "been omitted in any action in which judgment shall have passed "against the defendants named in the summons, and such omission "shall not have been pleaded in such action, the plaintiff, in case "the judgment therein shall remain unsatisfied, may by action re- "cover of such partner separately, upon proving his joint liability, "notwithstanding he may not have been named in the original ac- "tion; but the plaintiff shall have satisfaction of only one judgment "rendered for the same cause of action." N. C. Code of 1883, pp. 83, "84 (4).

"When any writ against joint and several obligors shall be returned "as to one or more, and *non est* as to the others, the clerk may renew "the writ against those upon whom it has not been served, and upon "service upon the other obligors and return thereof, the obligors may "pray the court to consolidate the actions, and the court may so con- "solidate such actions that no delay shall be caused thereby; but "judgment shall be entered against the obligor last summoned at the "same term as against the obligors first summoned, and in no case "shall delay be occasioned by such consolidation." Maryland Re- "vised Code of 1878, §57.

"A judgment rendered against one or more members of a partner- "ship, * * less than the whole number of partners, * shall not work "an extinguishment or merger of the cause of action on which said "judgment may have been rendered, as respects the liability of the "partners * not bound by such judgment; and they shall remain "liable to be sued as if their original responsibility had been joint "and several; *provided*, that but one satisfaction of the debt or de- "mand shall be made." *Ib.* §60.

"Suits may be brought by or against a partnership as such, or "against all or either of the individual members thereof, and a judg- "ment against the firm, as such, may be enforced against the part- "nership property or that of such members as have appeared or been "served with notice. But a new action may be brought against the "other members on the original cause of action." Iowa Code of 1884, § 2553.

"When a judgment shall be recovered against one or more of sev- "eral persons jointly indebted upon a contract, by proceeding as pro- "vided in section 157[a], those who were not originally summoned to "answer the complaint may be summoned to show cause why they "should not be bound by the judgment, in the same manner as if "they had been originally summoned." S. C. General Stats. of 1882, § 377.

a. § 157 made judgment in joint action bind partnership property, and that of served partner, severed judgment, and charged non-served partner in a separate action upon proof of his joint liability.

2. Act 6 April, 1830, P. L. 277.

3. "1. In actions against two or more persons jointly indebted upon "any joint obligation, contract, or liability, if the process issued "against all of the defendants shall have been duly served upon "either of them, the defendant so served shall answer to the plaintiff; "and in such case the judgment, if rendered in favor of the plaintiff, "shall be against all the defendants, in the same manner as if all had "been served with process.

"2. Such judgment shall be conclusive evidence of the liability of "the defendant who was personally served with process in the suit, "or who appeared therein; but against every other defendant, it shall "be evidence only of the extent of the plaintiff's demand after the "liability of such defendant shall have been established by other "evidence." Compiled Laws of Michigan, 1857, ch. 133. Re-enacted "Mich. Annotated Stats. of 1882, §§. 7730-1.

Judgment against some partners not a bar to suit against others if they were not served. A sued B, C & D, partners, on a firm note, in U. S. C. C., but obtained service only on C. Defendant offered in evidence judgment in State court against the three for amount of note. But only B had not been served in the State proceedings.—Judgment not a bar. Michigan statute limits judgment to defendant who is served with process. Mason v. Eldred, 6 Wall. 231 (1879).

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§83.

The courts of Pennsylvania restricted the remedial statute to joint actions, and, except in such actions, permitted the judgment against a partner to extinguish the claim against his co-partner.

The Pennsylvania act was restricted, by judicial interpretation, to the specific mischief pointed out, and limited, in its remedial operation, to joint actions. If an action was brought against one partner, or against any number less than all, the judgment would be a bar to the plaintiff's recovery against the co-partners. The act aided a plaintiff who observed the form, and did his best to obtain judgment against all.[1] He was no longer barred in his pursuit of them, because they succeeded in evading him. But, at that point the statutory relief ended. If the plaintiff severed, the act did not apply. Taking a partner's confessed judgment for the firm debt, merged the claim.[2] A specialty

was equally a merger of the claim. A sealed note, given by one partner, and accepted by the creditor for his claim, would bar his subsequent recourse to the other partner.[3]

If the plaintiff brought a joint action, he might proceed, if any defendants accepted service, to judgment against them, without securing service against all. The effort to serve was sufficiently shown by placing the writ in the sheriff's hands without any return being made by him, no prevention by the plaintiff of service by the sheriff being shown.[4]

1. *Accepting service does not make judgment in joint action a bar to subsequent suit against non-served partner.* A's summons against B, C & D, on their sealed note for a firm debt, was accepted by B and C, but no return made by sheriff as to D. A general award for A. He subsequently sued D, who objected that specialty merged claim in a joint debt which was discharged by an award based on the volunteer acceptance of B and C without any attempt to serve D.—Recovery. No evidence that A prevented service on D in order to maintain several actions on the joint obligation. Moore v. Hepburn, 5 Barr 399, Pa. (1847).

2. *Taking confessed judgment from partner merges claim against copartner.* A took B, a partner's, confessed judgment for the firm's debt, and also his bond and warrant, which A entered up in a different State. Not getting full satisfaction, A sued C, surviving partner, who pleaded the judgment and bond in bar.—Claim merged. Act 1830 remedied failure to get judgment against all defendants in a *joint* action, but did not change law in separate suits. Lewis v. Williams, 6 Wh. 263, Pa. (1841).

3. *Creditor, by taking partner's bond for firm debt, releases co-partner.* B & C agreed, in writing, that B should buy wheat with money furnished by C; that B should grind the wheat, and sell the flour; that the expenses should "be deducted from the proceeds, and the balance equally divided for profit or loss." B bought wheat, and gave A the following paper: "Due A for wheat to the amount of $441.87½. received by me, B." Afterwards, B gave A his note, under seal, for the said sum. On this note under seal, payments to the amount of $300 were indorsed. A sued B & C, in *assumpsit*, jointly. Reference to arbitrators, who reported in favor of A. C appealed from the award; B did not. Jury was sworn as to C alone. The above instruments were put in evidence, together with proof of repeated declarations of B and acts of C, indicating that they were partners. Verdict for A, and judgment accordingly.—Reversed. Accepting a specialty from, or obtaining judgment against, one partner for a firm debt, extinguishes all claim against the other partners, whether dormant partners or not. Anderson v. Levan, 1 W. & S. 334, Pa. (1841).

4. *If judgment confessed by partner, death of co-partner discharges his estate.* A's executor brought debt on joint and several bonds against

The death of a partner might prevent the claimant from bringing a joint action. The procedure again defeated the right. The law adhered to the joint process, and could not frame a joint action which would lie against the living and the representatives of a deceased partner.[1] The breach of his contract charged the partner's estate, but the absence of a remedy made the law deny this elementary right.[2] The claimant must sue the living partners, and look only to them for satisfaction.[3] As the remedy at law was inadequate, owing to its defective procedure, and excluded the claimant from access to his debtor's estate, he was driven to re-assert his right in equity, where the procedure does not run away with the right. Equity did not stickle at the forms of procedure, but it imposed terms upon the claimant.[4] He was entitled to relief against the deceased partner's estate, but, as the claim in equity was based upon an inadequacy of the remedy at law, the claimant must exhaust his legal redress.[5] Unless he proved the insolvency of the surviving partners and an absence of firm assets, or exhausted his remedies at law, he did not qualify himself to demand relief in equity.[6]

1. *Suing executor of deceased, with surviving, partner, error.* A sued B *et al.*, trading as a Brick Co., and joined D, administrator of C, a deceased partner, on the Co.'s sealed note. Defendants, *inter alia*, assigned as error the joinder of C's executors.—Misjoinder. Error, but S. C. amended record, by striking off administrators as co-defendants. Objection not having been made below, when plaintiffs could have amended under Act 4 May, 1852, P. L. 574, S. C. made amendment. Hoskinson v. Eliot, 12 Smith 393, Pa. (1869).

No joint remedy against surviving and executor of deceased partner. No resort to deceased partner's estate until remedy against survivor exhausted, or his insolvency shown. B & C made a firm note to A, who sued B and D, executor of C. Complaint did not aver insolvency of B, nor return of execution unsatisfied. D's defence: Complaint shows no cause of action against decedent's estate.—Judgment for D. Complaint must show insolvency of survivor, or remedy exhausted against him, because the firm fund in the hands of the sur-

vivor is primarily liable for firm debts. The surviving and executor of deceased partner cannot be made co-defendants in a suit at law under the code. The remedy is against the deceased partner's estate only in equity. Voorhis v. Childs, 17 N. Y. 355 (1858).

2. LOWRIE, C. J.: "It was only because the remedies were defective "that it (decedent's estate) was before (the statute, 11 April, 1848, §4 "*Infra* §88) exempt." 10 Cas. 412.

3. The cause of action against the deceased partner's estate does not accrue, or the statute of limitations begin to run, until the remedies against the surviving partner have been pursued.

Short statute of limitations don't bar firm creditor's suit against deceased partner's estate. Statute provided that upon executor's advertisement, creditors must present their claims within six months, and, if disputed, bring suit within six months. A was firm creditor of B & C. He only presented his claim, without suing the survivor, or proving him insolvent to C's executors, who equivocally disputed it, and did not include it in their account, which the surrogate confirmed. A excepted. Defence: No suit within six months.—Exception sustained. Claim must be definitely rejected. Statute runs only against absolute claims. A's claim contingent until insolvency of survivor shown, or remedy against him exhausted. A sufficient amount should be set apart to meet the claim should it become a charge against C's estate. Hoyt v. Bennett, 59 N. Y. 538 (1872).

4. *Surety's estate not charged in equity on account of principal's insolvency.* A sued executors of C, in 1814, for balance unpaid by B of specialty debt. B received the loan, and C was surety for its repayment. C died in 1807, and B became insolvent.—No equity to charge C's estate. Weaver v. Shryock, 6 S. & R. 262, Pa. (1820).

5. *Deceased partner's estate liable upon return of execution against surviving partner unsatisfied, or by proof of insolvency.* B & C, partners. C died, and A recovered judgment for a firm debt against B, as surviving partner. Execution was returned unsatisfied. A sued C's executrix. Defence: B had property.—Recovered. Exhausting legal remedy equivalent to proof of insolvency. Sheriff's return conclusive. Pope v. Cole, 55 N. Y. 124 (1873).

6. *Joinder of a deceased partner's representative, as defendant, with survivor, will, perhaps, be allowed, if the firm is insolvent; certainly if both firm and survivor are insolvent.* A made advances to B & C, on cotton shipped by the firm. He sold the cotton for the advances. 1 January, 1872, settlement of account showed balance of $62.54 due B & C. 27 June, 1872, B died. Though no provision had been made for it, C continued the business until 29 November, 1875, when the firm was proved to be insolvent, and C was so in fact. A sued D, B's executor, and C for balance of account, and obtained judgment. Exceptions: Representative of deceased, cannot be joined with surviving partner.—Not error. Code admits any joinder which could be made in equity. Insolvency of surviving partner, and of the firm, is sufficient to join deceased partner's representative as co-defendant, even if insolvency of the firm alone is not sufficient. Anderson v. Pollard, 62 Geo. 46 (1878).

§87.

The death of a partner pending suit against the firm also took away the plaintiff's right to proceed against his estate.

The remedy survived only against the living partners. The death could not be suggested of record, and a *sci. fa.* issued against the executors, to make them parties to the original suit.[1] The plaintiff could not join the deceased partner's representatives, even for conformity.[2] By unnecessarily joining them, plaintiff would not render surviving partner incompetent to testify because plaintiff would be excluded.[3]

1. *If surviving partner confesses judgment, deceased's estate is discharged.* A sued both B & C on a joint and several bail bond. B died, in 1823, pending suit, and *sci. fa.* against his administrators. Defence: C liable alone as surviving obligor. In 1840, C confessed judgment for claim, with interest from 1822. No satisfaction.—B's estate discharged. Finney v. Cochran, 1 W. & S. 112, Pa. (1841).

2. *Firm creditor must sue surviving partner, if solvent,* B & C made a note to D, and assigned to A. C died. B and D became his administrators. A sued B and D, but did not serve D. Both defendants appeared. Defence: A should first sue B, as survivor. Reply: Judgment asked against B alone; D joined merely for conformity, and his appearance irregular, without service.—B, being solvent, no cause of action against C's estate, and A must amend, by striking off D, who had the right to appear without service. Higgins v. Rockwell, 2 Duer 650, N. Y. (1853).

3. *Executors of deceased partners unnecessary parties; suit should be against surviving partners. Surviving partner not disqualified by joinder of deceased partner's executors as co-defendants.* A brought ejectment against B, C & D, partners. Both parties claimed title by sheriff sales of E's leasehold. A alleged that first sale, to defendants, was fraudulent, and second sale, to plaintiff, passed the title. A died, and his administrators were substituted; B died, and his executors were substituted. Defendants called C to disprove representations at first sheriff's sale, which took place before the death of either A or B, to buy in the title for E.—Incompetent, not because A an assignor and his administrators assignees under proviso to § 1 of Act 15 April, 1869; E is assignor of both, plaintiff and defendants; but because the cause of action arose from a tort, or contract, in A's lifetime, and, therefore, his administrators sue in their representative capacity, and as "next in interest," under Act 13 April, 1807, § 3. B's executors not being necessary parties to the ejectment against the surviving partners, the substitution did not render C incompetent. Oram v. Rothermel, 2 Outerbridge 300, Pa. (1881).

§88.

Acts of Pennsylvania provide against a failure of the process by the death of a partner pending suit.

The Act of 11 April, 1848, §4, enacts: "In suit or "suits which may hereafter be brought against the "executors or administrators of a deceased co-partner, "for the debt of a firm, it shall not be necessary to aver "on the record or prove on the trial, that the surviv- "ing partner or partners is or are insolvent to enable "the plaintiff to recover."[1]

The language does not mean that burden of proof is shifted from the plaintiff, and that the representatives of the deceased partner may set up the solvency of the surviving partner as a defence to the suit.[2] On the contrary, the statute gives a direct and immediate remedy against any or all of the partners or their estates.[3]

1. P. L. 536.

2. *Statute gives firm creditor direct remedy against deceased partner's estate.* A sued D, administratrix of B, who had given A the firm notes of B & C. A had sued C, as surviving partner, but the verdict was for C.—Judgment for A. Under act remedy alternative, in accordance with the "general principle of partnership relation, which makes the estate of each partner responsible for partnership debts." Brewster v. Sterrett, 8 Casey 115, Pa. (1858).

3. *Remedy against surviving and deceased partner cumulative.* B & C, partners. A recovered judgment against C, surviving partner, and upon distribution of B's estate in Orphans' Court, claimed payment. Judgment not disputed as liquidation of claim before auditors and court below.—Entitled. Remedies made cumulative in order to correct defect of Common law procedure. Moore's Appeal, 10 Casey 411, Pa. (1859).

The death of a partner no longer exempts his estate from liability for the firm debts where his co-partner is solvent; nor does it merely shift the burden of proof upon his representatives, who can exempt his estate by proving the surviving partner's solvency; but the deceased partner's estate is liable in the first instance, at the creditor's option, for the amount of his debt.

Deceased partner's estate liable for firm debts. B, C & D, partners, employed nephew A, at wages, for 17 years. B died; C & D paid amount due A for services.—B's estate liable for its third. Moist's Appeal, 24 Smith 166, Pa. (1873).

Deceased partner's estate liable for firm debts in first instance. B took C into partnership. C became joint owner of the assets of the business, and jointly liable for B's debts. B & C gave D a note for his claim of $2,666.64. C sold out his interest to E, who succeeded to C's liabilities. F bought out B, succeeding to his liabilities, and continued the business with E. E settled with A, to whom D had endorsed the note, by giving four notes of E & F, also signed by B & C, for the original note, which was to be surrendered when the four notes were signed by G. He never signed, and A proved the debt against F's estate. Two of the notes were allowed and paid, but the others were contested.—Judgment for A. He was not bound to exhaust the firm's assets in E's hands before proceeding against F's estate. B's debt became a joint obligation upon his taking C in partnership, and continued joint through the various changes. Silverman v. Chase, 90 Ill. 37 (1878).

A subsequent statute enacts: "That in no case * "on any joint contract * shall the courts * entertain "any plea or defence upon the part of any heir * ex- "ecutor or * administrator that one or more of said * "contractors * has deceased since the commencement "of * suit; but the same shall be proceeded in to "judgment and execution against the estate of said "decedent, as though said suit * had been com- "menced against said decedent alone."[4]

This act was not limited in its effect to the mischief of a joint action; which would be cured by giving the plaintiff a new suit against the deceased partner's representatives. For why put the plaintiff to the delay and expense of another suit? If no action corresponds to the right, let the courts frame actions to enforce the rights which they establish.[5] The process of suggesting the death of a party on the record, and of substituting his representatives, is familiar practice, and dispenses with the circuity of an additional suit. The embarrassment of the situation was imaginary, and the joint suit proceeds as if no defendant had died.[6]

Similar enactments were made in different States, to preserve the remedy against the estate of a partner, if he died before suit had been brought, or judgment obtained against him.[7]

In equity, joint process against both is feasible, and the claim no longer survives against the living partner even as a principal with the decedent's estate as surety, but founds a direct remedy against both.[8]

4. Act of 22 March, 1861, P. L. 186.

5. "It shall be the duty of the Supreme Court, at their sessions in "banc, from time to time, to devise and establish, by rule of court, "such new writs and forms of proceedings, as in their opinion shall be "necessary or convenient to the full, direct, and uniform execution "of the powers and jurisdiction possessed by the said Court, or by "the Courts of Common Pleas, District Courts, Orphans' Courts or "Registers' Courts." Act 16 June, 1836, § 3, P. L. 786.

Mr. Justice GORDON: "If any serious difficulty should be found to "occur from the ordinary forms of the writs now in use, this Court "can, under the 3d section of the act of June, 1836, provide such new "or modified forms as may be required to meet the exigency. We "think, however, this will not be found to be necessary." Dingman v. Amsink, 27 Smith 118, Pa. (1874).

6. *A partner's death after suit brought is no bar to a joint judgment against his administrators and the surviving partner.* A, the holder, brought assumpsit against the makers of a joint promissory note, signed with the firm name of B & C. After service upon both parties, B died, and his administrators were substituted. Judgment against B's administrators and C.—Not error. Act 22 March, 1861, P. L. 186, not only recognized the several liability of joint debtors, and provided a separate remedy after joint process, but worked out the independent remedies through a joint judgment against the survivor and the deceased's estate. *Sci. fa. sur* mortgage, or to revive judgment, issues against living and the representatives of deceased defendants. Act June, 1836, § 3, P. L. 786, would give a new writ if required. Execution against a decedent's estate is regulated by Act 24 February, 1834, and if his real estate is sought to be charged, the widow and heirs must be brought in by § 34. Dingman v. Amsink, 27 Smith 114, Pa. (1874).

7. "The representatives of one jointly bound with another for the "payment of any debt or for performance or forbearance of any act "or for any other thing, and dying in the life-time of the latter, may "be charged by virtue of such obligation in the same manner as such "representative might have been charged if the obligors had been "bound severally as well as jointly: Provided, that the plaintiff shall "first pursue the surviving debtor to final judgment and execution." Rhode Island Public Stats. of 1882, § 28.

"In any action founded on any * contract or liability of co-part-"ners, it shall be lawful to sue any one or more of the parties liable "on such * contract or liability; and separate suits may be brought

"against the representatives of such of the parties as have died, or "joint suits may be brought against the representatives of such de-"ceased party and those who are alive and bound therein." Miss. "Revised Code of 1880, § 1134.

"The representatives of one jointly bound with another for the "payment of a debt, or for the performance or forbearance of any act, "or for any other thing, and dying in the life-time of the latter, may "be charged by virtue of such obligation, in the same manner as "such representatives might have been charged, if the obligors "had been bound severally as well as jointly." N. J. Revision of 1709–1877, § 3.

"All joint obligations and promises, are made joint and several, and "the debt or obligation shall survive against the heirs and personal "representatives of deceased obligors, as well as against the surviv-"ors, and suits may be brought and prosecuted on the same, against "all or any part of the original obligors, and all or any part of the "representatives of deceased obligors, as if such obligations and as-"sumptions were joint and several." Tenn. Code of 1884, § 3486.

"If one of the several obligors or promisors jointly holden by a "contract in writing dies, the representatives of such deceased per-"son, and the surviving obligors or promisors, may be charged by "virtue of such contract in the same manner as if it had been joint "and several." Vt. Revised Laws of 1880, § 935.

After proceedings against firm as if insolvent, the Statute adds the proviso: "Nothing herein invalidates the right of claimants to re-"cover from the surviving partner, or the estate of the deceased "partner any balances due them after the partnership property is "exhausted." Maine Revised Stats. of 1883, p. 571, § 3.

"Whenever two or more persons are sued as joint defendants, and "on the trial the plaintiff fails to prove a joint cause of action against "all, but proves a cause of action against one or more of the defend-"ants judgment may be rendered against him or them against whom "the cause of action is pending." Minnesota Laws 1873, c. 87; Gen. St. 1878, c. 66, § 266; Wisconsin Revised Stats. of 1878, § 2885.

"In case of the death of one or more of the joint obligors or prom-"isors, the joint debt or contract shall and may survive against the "heirs, executors and administrators of the deceased obligor or "promisor as well as against the survivors." Kansas Compiled Laws of 1885 (1076), § 2.

"When all the obligors or promisors shall die, the debt or con-"tract shall survive against the heirs, executors and administrators "of all the deceased joint obligors and promisors." *Ib.* (1077) § 3.

"Where two or more persons are jointly bound by bond, promis-"sory note, or any other writing, whether sealed or unsealed, to pay "money or do any other thing, and one or more of such persons shall "die, his or their executors and heirs shall be bound in the same "manner and to the same extent as if the person so dying had been "bound severally as well as jointly." M'd Revised Code of 1878, § 51.

"If a joint obligor be dead when the suit is brought, his representa-"tive may be sued." *Ib.* § 53.

"If either of the obligors, against whom a joint action shall be "brought, shall die pending the same, the plaintiff may suggest such "death, and the court shall cause the suggestion to be entered of "record, and shall direct the clerk to docket an action as of the same "term in which the suggestion is entered, in the name of the plaintiff "against the obligor so dying; and in such action the same proceed-"ings shall be had to make the executor or administrator of the de-

"ceased obligor a party thereto, as if the original action had been "brought separately against all the obligors." *Ib.* § 54.

8. *The remedy in equity corresponds to the right.* A sued B's executors for B & C's debt, and, upon C's administration of B's estate, proved for £5,124, 13*s*. 4*d*. A dividend of 5 per cent. was declared, but before payment A sued executors of C, testifying that C was B's partner. Defence: A's testimony incompetent against deceased's adversary; proof against separate estate *res adjudicata*, and bars recourse to surviving partner.—A competent. Proof did not extinguish claim, but right against C's estate preserved subject to his separate creditors. In re Hodgson; Beckett v. Ramsdale. 31 Ch. D. 177 (1855).

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§89.

A statute of Pennsylvania severed the judgment, so that it binds the representatives of the deceased, as well as the surviving, partner.

The death of one partner after judgment against both, releases his personal estate from liability for the plaintiff's claim, although it has been liquidated and established by the judgment.[1] A *sci. fa.* would not lie against the personal representatives of the deceased judgment-debtor, although it was suggested in the writ that the surviving defendant was insolvent, and that the plaintiff had no remedy.[2]

In Pennsylvania, an act was passed to rectify the procedure and make it conform to the right:

Section 3. "Where a judgment shall hereafter be "obtained against two or more co-partners * the death "of one or more of the defendants shall not discharge "his or their estate or estates, real or personal, from "the payment thereof; but the same shall be payable "by his or their executors or administrators, as if the "judgment had been several against the deceased "alone."

Section 5. "Where a judgment shall be hereafter "recovered against one or more of several partners, "without any plea in abatement, that all the parties "to the instrument or contract on which the suit is "founded are not made parties thereto such judgment "shall not be a bar to a recovery in any subsequent "suit or suits against any person or persons who "might have been joined in the action in which such "judgment was obtained, whether the same shall be "obtained amicably or by adversary process."[3]

Other States have also provided that a judgment shall bind a partner's estate in spite of his death.[4]

1. Walter v. Ginrich, *supra* § 83, n. 3. There is no reason for any distinction between the deceased partner's real and personal estate. The judgment should survive against both, or against neither. Commonwealth v. Mateer, 16 S. & R. 419, Pa. (1827).

2. *Death of partner after judgment discharges his personal estate, though lien continues on his real estate.* *Sci. fa.*, in 1845, by Pa., for A's administrator against administrators of C, surety on administration bond, who had died since judgment in 1824, against B & C, which was recovered by creditor of B for his devastavit. B, the principal in the bond, and sole surviving obligor, was insolvent.—C's personal estate discharged by his death, and lien against his real estate outlawed. Stoner v. Stroman, 9 W. & S. 85, Pa. (1845).

3. Act 11 April, 1848, P. L. 536.

4. "JOINT DEBTOR DYING. ESTATE HOW LIABLE." "When two or "more persons are indebted on any joint contract, or upon a judg-"ment founded on a joint contract, and either of them dies, his "estate is liable therefor, and the amount thereof may be allowed "by the commissioners, as if the contract had been joint and several, "or as if the judgment had been against him alone." Minn. Stats. of 1878, § 19; Wis. enactment substantially the same. Revised Stats. of 1878, § 3848.

"If any person jointly bound with another in any contract or by "judgment, shall die in the life-time of such other obligor, his heir, "devisee, or representative may be charged in the same manner as "if the contract or judgment had been separate against the decedent." Kentucky, Gen'l Stats. of 1881, § 8.

"If any of the obligors against whom a joint action was brought, "and judgment obtained thereon, shall die after judgment, the "plaintiff may issue a *scire facias* on said judgment against the ex-"ecutors or administrators of the deceased defendant, and such judg-"ment shall be had on the *scire facias* as if the judgment had been "rendered in a separate action." Maryland Revised Code of 1876, § 55.

"When two or more persons shall be indebted on any joint con-"tract, or upon a judgment founded on a joint contract, and either

"of them shall die, his estate shall be liable therefor, and it may be "allowed by the commissioners, as if the contract had been joint and "several, or as if the judgment had been against him alone, and the "other parties to such joint contract may be compelled to contribute "or to pay the same, if they would have been liable to do so upon "payment thereof by the deceased." Mich. Annotated Stats. of 1882, p. 1543, § 5906.

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§90.

The statutes recognize the several liabilities of the partners underlying the joint form of the contract, and make the procedure conform to the liability which it enforces.

The judgment stands against the defendant, and, as he is liable for the whole debt individually, the co-partner is not prejudiced by limiting the judgment to the defendant. The release of the co-partner by merger was a fiction of procedure. Nothing but satisfaction of the claim exonerates him, and he cannot complain, because he is compelled to pay his debt. The cause of action is severed with the judgment which establishes it.[1] The technical crochet, however, has taken firm hold of the Professional mind, and it is difficult to eradicate the notion that a partner has a right to repudiate his debt in consequence of the creditor's litigation with his co-partner.[2]

The release of a joint debtor, or a compromise with him, enured to the benefit of his co-debtors, on the joint contract theory, and in analogy to the procedure by which the claim would be enforced.[3] Statutes have also been passed to extirpate this outlying vestige of the conceit.[4]

The fiction, to maintain itself, creates an artificial course of reasoning, which the Profession calls legal

reasoning, as if the law had appropriated a special intellectual process for its practitioners. The creditor asks for payment from his debtors, and the Profession tells him a judgment, or, in other words, the entry of his claim on the record of a court, against one of his debtors, is payment by the others. The creditor wonders how the procedure, which is but the means to procure payment from several debtors, who are each admittedly liable for the whole amount, can pervert the lawyer's faculty of reason, and make him think he is talking sense. The Profession is like the parent who, when his son asked for bread, gave him a stone. The parable is an answer to the casuistry which, in the name of justice, substitutes a sham for performance.

1. *Statutory severance of judgment severs the cause of action.* A sued executors of B, co-maker with C & D of promissory note for $1,200. Defence: B co-surety with C for D, and no equity against B's estate, although C & D insolvent.—Recovery. Act 1848 made joint judgment-debtor's estate liable, and cause of action severed to correspond with judgment. Bowman v. Kistler, 9 Casey 106, Pa. (1859).

2. *Supra* § 77, n. 3.

3. *Release of non-served partner extinguishes judgment against co-partner for firm debt to extent of partner's quota.* B & C, partners, in Indiana, contracted debt to A, in Philadelphia. In action brought in Pennsylvania, judgment taken against B for want of appearance. Return: "*Nihil habet*" as to C. Subsequent suit against C in Indiana, and A released C. B's defence: Release operated as satisfaction of judgment against him.—Release extinguished moiety of judgment-debt. Greenwald v. Kaster, 5 Norris 45, Pa. (1878).

Partner and firm creditor may stipulate that release shall operate not to discharge co-partner. A released B and C, on payment of part due by B, C & D, partners, but reserved right against D, whom he subsequently sued for balance.—Recovered. Apart from Civil Code, § 1543, A might release B & C. Northern Ins. Co. v. Potter, 63 Cal. 157 (1883).

Vide note to Bailey v. Edwards, 116 English Common Law Reports 761, p. 775 (1866).

4. Pennsylvania Act of 22 March, 1862, §§ 1–5, P. L. 167; Kansas Compiled Laws of 1885, Release (1079), §5; Compromise (3626–9 1–3) §§ 1–4; Michigan Annotated Statutes of 1882, §§ 7783–6; California Civil Code §1543; Minnesota Statutes of 1878, § 37; Mississippi Revised Code of 1880, §1003; New Jersey Supplement to Revision of 1877–86, §§ 1–4; Ohio Revised Statutes of 1884, §§ 3162–5; Rhode Island Public Statutes

of 1882, §§ 1–6; South Carolina Laws of 1883, §§1–3; Vermont Revised Laws of 1880, §§ 936–7; Virginia Code of 1873, §§ 14–15.

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§91.

The creditor was put to his election between a joint and a several remedy, but he is, on principle, entitled to either, or both, for the satisfaction of his claim.

The distinction between a joint and a joint and several contract has been almost obliterated. The Supreme Court of Pennsylvania, at one time, said that there were no more joint contracts, and that all joint contracts had become joint and several.[1] This statement, perhaps, is not strictly accurate. The claim of co-obligees, whether partners or not, is still joint, and, while it is now possible to recover against one upon proof of a promise by two,[2] it is impossible to recover against one upon proof of his individual promise when sued in conjunction with another. But if the statement were true in its entirety, the change would still not meet the requirement of the partnership promise. The joint and several is fully as technical as the joint contract, and comes but little nearer an adequate expression of the firm undertaking.

The difficulty of the subject arises from the Common law abstraction of a joint obligation. In a common sense view, if three promise to pay one hundred dollars, there is the promise of A, the promise of B, and the promise of C, to make this payment. Each guarantees to the promisee the receipt of the sum. The Common lawyers were not satisfied with so simple an explanation, but conjured up the abstraction of a sin-

gle promise made by the three, and different from a promise by each of the three to pay the single sum. Owing to this substantive difference between the joint obligation and the separate obligations of the promissors, it was held that the proof of a joint contract in a suit against one established a variance, and put the plaintiff out of court. In consequence of this theory, the whole claim was merged in a judgment against one of several debtors, and the co-debtors were thereby released, because there could be but one judgment upon one and the same obligation. A release of one co-debtor by contract had the same effect, and for the same reason.

The same mental process is observed among the civilians, and the best definition of the joint contract, as a common feature of both systems of jurisprudence, is given by RIBBENTROP, namely: "A unitary obligation with a plurality of subjective relations."[1] The theory of a joint and several contract retains this abstraction in its integrity, and simply adds the separate promise of each partner as an additional and alternative security. These separate promises are alternative to each other and to the joint promise. If the plaintiff sued one obligor on a joint and several contract, the defendant could not plead in bar the nonjoinder of his co-obligors, because of his separate promise, but if, after judgment, the plaintiff failed to obtain satisfaction, the others were released, on the ground that the plaintiff had made his election. The result is that where the plaintiff, out of abundant caution, has taken the promise of three to pay him the sum, the fanciful interpretation put by the law upon his contract deprives him of the security for

which he bargained. It is no answer to say that he might have sued them all jointly, for that is to make a substantive right depend upon the form of procedure, and why should he be compelled to sue jointly when he has, in fact, a contract with each. In a suit against one, the defendant's only privilege is to plead in abatement the non-joinder of his co-obligors, which does not effect the substantive right. If the first defendant has waived that privilege, the second defendant would lose it as to the first one, because its purpose had been already accomplished in the judgment against the first.[4]

The difficulty is by no means insuperable. The law does, in the case of torts, recognize and enforce an aggregate of obligations for the same performance; co-tort feasors are liable jointly, separately, and successively, and all that is necessary is to apply to contracts the principles which govern in the case of torts. The theory of the law will then conform to the nature of the transaction.

1. *Change of note from joint to joint and several immaterial.* Administrator of A sued B & C, as makers of a joint and several promissory note. B was served, but C was not. B's defence: Note originally joint, and the words of severalty, "or either of us," interlined after signature.—Recovery. Alteration immaterial, as Acts '30 and '48 have converted joint obligations into joint and several obligations. Miller v. Reed, 3 Casey 244, Pa. (1856).

2. *Separate judgment good though claim joint.* A sued B & C, on notes signed with firm name. C's defence: B gave notes for his individual debt to A.—Judgment against B alone. A appealed.—Affirmed. Separate judgment good against B, although claim joint. Roberts v. Pepple, 55 Mich. 367 (1884).

"If all the defendants have been served, judgment may be taken "against any or either of them severally, when the plaintiff would be "entitled to judgment against such defendant or defendants, if the "action had been against them, or any of them alone." Civil Code of Oregon, § 59, sub-division 3. Identical provision: Wisconsin Revised Statutes of 1878, § 2884, sub § 2.

Joint contract covers several claims. A sued B, C & D, trading as B & C, for merchandise. C claimed that he contributed capital and conducted business for his infant son, D. A dismissed action as

against D, and court, on C's application, against him.—Error. C liable as partner with B. Suit on joint contract made by three don't prevent judgment against two of them. Miles v. Wenn, 27 Minn. 56 (1880).

Several liability enforced in joint action. A obtained verdict against B C, *et al.*, for effecting sale of their land, but B was dead at the time, and his executors had been substituted as defendants.—Judgment for B C, *et al.*, notwithstanding verdict.—New trial. Code permits judgment in joint action against defendants upon a separate claim. Fish v. Henarie, 13 Pac. Rep'r. 193, Or. (1886).

3. Die Natur der Correalobligationen, von Dr. Hermann Fitting; Einleitung, §. 2, 1859.

"Das Römische Recht annerkennt die Möglichkeit mehrfacher directer subjectiver Beziehung einer Obligation." Ueber Litis Contestation, §. 52, a. von Dr. F. L. Keller, 1827; Zur Lehre von den Correal-Obligationen, §. 5; von Dr. Georg Julius Ribbentrop, 1831.

"Da sich die Correalobligation als ein einziges objectives obligatorisches Rechtsverhältnitz, aber mit Mehrheit der subjectiven Beziehungen." Prof. Dr. Puntschart, Kritische Vierteljahrsschrift für Gesetzgebung und Rechtswissenschaft, 29 Band, 513, 514 (1887).

Lehrbuch der Pandecten, §. 213, von L. Arndts, R. v. Arnesburg, 13th edition, 1886.

Die Correalobligationen, p. 6, *et seq.*, von Jos. Leonz Weibel (1878).

Institutes of Justinian, 1 vol. 472-477. By J. B. Moyle, B.C.L., M. A. (1883).

See, in opposition to the theory: Les Obligations en droit Roman; Par P. Van Wetter, 2 vol. 290, § 54 (1882).

Roman Law, 2d edition, pp. 551, *et seq.* By W. A. Hunter, M. A., LL.D (1885).

4. Kendall v. Hamilton (dissent of Lord PENZANCE), *supra* § 77, n. 3.

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§92.

Lord Mansfield demonstrated that the joint contract was several, by permitting a defendant to plead in abatement the non-joinder of his co-promissor, and by denying that his non-joinder was a bar to the several action.

How did the change come about which converted the joint contract of the Common law into the joint, though severable, contract of partners with third persons? Prior to Rice v. Shute,[1] a plea in abatement could not be sustained in assumpsit, though allowed in debt, and proof of a joint contract put the plaintiff

out of court. Much less was the failure to plead in abatement a severance of the joint contract into several contracts, so as to enable the plaintiff to recover upon one instead of upon all, as a unit without parts.

The change came about by following the course which had always prevailed in the action of debt. There non-joinder of any one liable with the defendant was pleadable in abatement. The debt being the result of an obligation, was viewed apart from its source in contract, and, if demanded from the debtor, should be paid by him, unless he saw fit to turn the plaintiff's suit into a means of enforcing contribution from his co-debtor in advance, instead of by a subsequent suit. The absence of a plea in abatement indicated a willingness to rely upon a subsequent suit for contribution, and the judgment merged the cause of action, which was always single.

If only one partner was sued in assumpsit, he could not plead his co-partner's non-joinder in abatement before Rice v. Shute, in 1770, because a joint contract was a totally distinct cause of action, and the plea went to the merits. It was bad, as amounting to the general issue, and should be a plea in bar. Proof of the joint contract would defeat the plaintiff's recovery. A joint contract is a unit without parts, and not an aggregate of parts. Though the contract were joint and several, suit against one would be an election which would make the contract several and preclude any subsequent action upon it as joint. Lord MANSFIELD'S adoption of a plea in abatement broke down the Common law notion of a joint contract, and proved that it contained an aggregate of contracts. The part-

ner might, in the first instance, make the plaintiff, because he had dealt with the firm, join all its members. But the firm is not a person and makes no contract. It is the partners who contract, and each partner contracts to pay the whole debt. Unless a plea in abatement is put in, the plaintiff may proceed against any partner and recover judgment on his contract. This rule needed further development, for while Lord MANSFIELD clearly indicated the principle on which the theory of contracts was to be remodeled, the decision in Rice v. Shute itself was merely an entering wedge. If the reasoning of Lord MANSFIELD is admitted, it follows, as an inevitable conclusion, that a co-partner may not plead in a subsequent suit the judgment in bar, because it merged only the contract of the defendant in the original suit, or in abatement, because he cannot give the plaintiff a better writ.

1. *Supra* §80, n. 1.

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§93.

Chief Justice Marshall carried out the principle, and held that the judgment against a partner was several, and did not merge the claim against his co-partner.

Chief Justice MARSHALL carried forward the revolution in the theory begun by Lord MANSFIELD. The claimant, who brought a separate suit against one partner, on a firm contract, and obtained judgment, subsequently brought a joint suit against both. MARSHALL decided that the judgment on the contract of one partner could not merge the contract of his co-partner,

unless the judgment included the co-partner and bound him.

1. *Judgment against partner does not merge firm contract, but enforces partner's several liability on it.* A, who sued B singly on a note made by B & C, trading as B, and obtained judgment, sued B & C jointly on the note. C pleaded the judgment in bar.—Judgment for A. Judgment on B's contract did not merge C's contract. Sheehy v. Mandeville, 6 Cranch 253 (1810).

The judgment against a partner on a firm claim, does not convert it into a separate claim. The contract was with the firm, and not with the partner in his individual capacity.

Contra: Firm's claim for improvement on land of partner. B & C were partners. Firm expended money, for its own purposes, in improvement of B's land. B confessed judgment to A for a firm debt. Firm assigned for creditors, and assignee sought to restrain A from selling, without notice of firm's equitable lien for improvements.—A enjoined. Firm debt merged in judgment, which covered only B's separate title. Whether lien embraced all the improvements, or limited to C's quota, not decided. Averill v. Loucks, 6 Barb. 19, N. Y. (1849.)

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§94.

The modern procedure admits the several causes of action, and so far from forcing a junction in a single action, requires a new action against partners who were not served in the original suit.

The cause of action is no longer joint. The practice shows that the old fiction has been superceded and replaced by a new principle. If service had been effected upon some partners, the former process was to bring in the others by an *alias* or a *pluries* writ, in order to make them parties to the original proceeding, and in order to enter a single judgment against all.[1] Now that the judgment does not bar subsequent proceedings upon the contract, it was conceived that an *alias* or *pluries* should bring in the other partners in order to let them into a defence under the original process. On the contrary, a new writ issues, as if

based upon an independent cause of action.[2] The separate suit shows that the firm contract is severable and not joint.

1. How did the plaintiff declare when all the partners were not served? He declared against those who had been served. The declaration set forth the cause of action, and the judgment was based upon the declaration. If the declaration was against more defendants than the judgment,[a] or the judgment against more defendants than the declaration,[b] the error was fatal, except under statutory provisions.[c]

a. *Judgment against three and declaration against six, bad on error.* A brought action of debt on bond against six. By sheriff's return, three were summoned. Declaration general against all, and judgment by default. Amendment and judgment entered against three.—Error. Judgment on joint claim couldn't stand, except against all. Declaration should be against three who were summoned, with averment of process against rest, who could not be found. Latshaw v. Steinman, 11 S. & R. 357, Pa. (1824).

b. *Judgment against two, with declaration against but one, bad on error.* A issued *capias* against B & C, but sheriff failed to find C. Declaration against B, and *alias* against C, who also entered bail. Reference to arbitrators, who made award for A.—Judgment on award reversed, because declaration was against B, and no claim on the record against C. Stewart v. Abrams, 7 Watts 448, Pa. (1838).

c. *On a declaration against defendants, judgment may be entered against two served.* A sued and declared against B, C & D on a firm contract. D not served. Evidence failed to prove D a co-contractor. Judgment obtained against B and C, who appealed.—Affirmed. A variance at Common law. Code permits judgment against any defendants served, who are proved liable, and by inference against those served when others are not proved liable. Pruyn v. Black, 21 N. Y. 300 (1860).

2. *Judgment against partner served, and second action against co-partners.* A sued B, C & D, joint makers of a note. B was served, but C & D returned 'not found.' Declaration and judgment by default for amount of note and interest against B. *Alias* and *pluries* summons against C & D, who averred material alteration, by adding "with interest" after note was made. Evidence to show defendant's assent excluded.—Error. New suit should be brought against non-served defendants. Statute contemplates judgment in first action before second brought. Myers v. Nell, 4 W. N. 229, Pa. (1877).

After judgment against partners served, "a new action may be brought against the other members on the original cause of action." Iowa Code of 1884, § 2553.

§95.

The several liability of a partner, so long repudiated, is now a recognized constituent of the firm liability, and there is no joint liability independent of it.

The joint contract at the Common law was not made up of the partners' several contracts, but was independent of, and not connected with them. The judgment confessed for the whole sum, by a single partner against himself, or recovered against him, would not merge the firm debt and prevent a joint action.[1] The judgment would be several, unless given in the course of a joint suit, and would not, therefore, be co-extensive with the firm debt.[2] The separate contract was a different undertaking, not included in the general contract of the firm. The relinquishment, therefore, of the joint contract furnished a consideration for the several contract of a partner.[3] At present, the opposite is true. The several obligation of a partner is no longer a separate and independent liability, apart from the joint obligation of the firm, but forms part of that obligation, and is included in it.[4] The promise of a creditor to release the outgoing and look to the continuing partners for payment, is not binding for want of consideration. The creditor had the several liability of the continuing partner already in the joint obligation.[5] In fact, every joint contract is an aggregate of the several contracts of the partners.

1. *Judgment against single partner for firm debt is several, and will not stand for firm debt.* A sued B & C, partners, before magistrate. Service effected only upon B, and judgment rendered against him. On appeal, trial ended in verdict and judgment against B.—Reversed. Judgment erroneous. B not a party to suit, which was joint against B & C. Craig v. Smith, 15 Pac. Rep'r 337, Col. (1887).

2. The partner represents his co-partners, or the joint title, and the judgment recovered against him, entitles the creditor to seize and sell the firm property. The question is: Does the execution correspond to the judgment, or to the claim? In an adverse judgment, the declaration must be against the partner served, although for a partnership debt.[a] The judgment would appear only against him, and if it included the co-partner, would be wrong.[b] A confessed judgment by one partner is void as to his co-partner, who may have the entry against him stricken off the record.[c] The claim, and not the judgment upon it, is the groundwork of the execution. The judgment in Ross v. Howell[d] entitled the creditor to proceed, by execution, against the firm assets. The co-partner had no grievance, because the claim was for a firm obligation, and not for the separate debt of the partner. Had the claim been for the individual debt of the partner, the co-partner could apply to open the judgment, and be let into a defence, in order to disprove a debt due by the firm, and rectify the cause of action, even after it had been merged in a judgment. He never had his day in court to make a defence to the claim. But as the judgment does not bind his separate estate under the Pennsylvania practice, and as the partner may admit a debt against the firm, his confession of judgment will be conclusive that the firm owes the debt claimed by the plaintiff.

a. Latshaw v. Steinman, *supra* § 94, n. *a*.

b. Stewart v. Abrams, *supra* § 94, n. *b*.

c. *If partner confessed judgment against firm, co-partner may have his name stricken off, in order to prevent execution against his separate estate.* C & D were partners. C, in an amicable action, confessed judgment against himself and D for a firm debt, and in favor of A & B. Upon the affidavit of D, the court below set aside the judgment, on the ground that one partner had no power to confess judgment against the firm, and that it was void as to D, and therefore void as to C also. On writ of error, it was argued that one partner might employ counsel, and authorize him to confess a judgment against the firm. Was a warrant to confess, anything but an equivalent?—Order of court below, setting aside the judgment, reversed, aud the name of D ordered to be stricken out of the record, so that the judgment should remain against C alone. C had transcended a partner's implied power. Bitzer v. Shunk, 1. W. & S. 340, Pa. (1841)

d. *Judgment against partner for firm debt binds firm, but not co-partner's separate estate.* B, the co-partner of C, gave A a judgment note for a debt of B & C. A entered up the judgment, and levied on firm property. C claimed that execution should correspond to the

judgment which B had confessed.—C could not prevent A from taking the firm stock in execution on his judgment against B. Ross v. Howell 3 Norris 129, Pa. (1877).

3. *Judgment against partner don't merge cause of action against firm.* A brought assumpsit against firm B & C on book account. Defendants put in evidence B's judgment note, for which A receipted as in full, if paid, for the account. A sued B & C after entering judgment on the warrant.—Judgment no bar to action, not being co-extensive with claim against both, and receipt disproving intention to receive judgment as satisfaction. Act 6 April, 1830, no application, because judgment not entered in a joint suit. Wallace v. Fairman, 4 Watts 378, Pa. (1835).

4. A co-partner who is not served with the partner defendant is not within the Pennsylvania act of 27 March, 1865, P. L. 38, which allows a partner to compel his adversary, or the adverse beneficiary of the suit, to testify, although a suit was on a firm contract, because the Pennsylvania acts of Assembly have severed the cause of action involved in a firm contract.

Partner not served not interested in suit. A sued B, executor of C, for debt contracted by C, D & E. Plaintiff offered D's deposition in evidence, to prove partnership.—Incompetent, on ground of interest, and not made competent by act 27 March, 1865, as adverse beneficiary of action. Hogeboom v. Gibbs, 7 Norris, 235, Pa. (1878).

5. *Promise to release outgoing partner nudum pactum.* B & C dissolved, and C continued the business. A, who received notice of dissolution and continuance, promised B to release him, and rely on C's agreement to pay the debt.—No consideration for A's promise. Walstrom v. Hopkins, 7 Out. 118, Pa. (1883).

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§96.

The firm being a phrase, not a person, its contract is nothing but an aggregate of the contracts which the partners make.

The fact is, that the jointness of the contract is nothing but a form. The only contracts that have a substantive existence, are the individual contracts of the partners. A partner who sued to enforce an individual claim, might be met by a counter-claim against his firm. If the firm debt was not in the

same right, that is, was not a several debt of the plaintiff, it would not be a set-off against the demand.[1]

The partners may apportion the liabilities between them, and the agreement being in anticipation of the contribution enforced by law, will be upheld as a contract, and an action will lie upon it during the partnership.[2]

The Scotch avoided the English pitfall by adopting the French practice, and did not follow the Common law formula, based on the joint contract.[3]

1. *Deceased partner's debt set-off against firm in suit by surviving partner.* The administrator of A, surviving partner of B, sued D, who pleaded set-off against A & B.—Certificate for D. Firm debt absolute liability of deceased partner's estate, and might be set-off against his separate claim. Blair v. Wood, 12 Out. 278, Pa. (1885).

2. *Partners' contract with each other, to divide the firm debt and each pay his apportioned part, enforced at law.* A, B, and four others, were railroad contractors, in partnership. The firm owed $20,000. The debt was apportioned among the partners: each agreed to pay his portion, and indemnify his partners to that extent. B's share of the debt was $5,000, which he refused, and which A was compelled, to pay. A sued to recover the payment made on B's account, on his contract.—Recovered. Though the contract related to the partners' liability for a firm debt, and the consideration was their separate estate liability, the law enforced the contract, because it did not involve a partnership account. Edwards v. Remington, 51 Wis. 336 (1881).

If a partner contracts to pay half a firm debt, co-partner may enforce the payment at law. A & B, in settlement of the partnership business, divided everything but the result of a lawsuit, which they agreed to share equally. A, who paid the judgment and costs, sued B for his half.—Recovered. Partners may, by contract, sever an item from the partnership account, and sue at law for a breach. Gauger v. Pautz, 45 Wis. 449 (1878).

An apportionment is the Civil law rule in non-commercial partnership. *Supra* § 79, n. 2, *a*.

3. A Treatise on the Law of Partnership and Joint Stock Companies, according to the Law of Scotland, by FRANCIS WILLIAM COOK, Advocate, 1 vol. p. 541: 1866.

CHAPTER VI.

THE TITLE TO FIRM PROPERTY.

§97.

Co-ownership puts a restriction upon the owners, co-extensive with the association of title.

The partners' title to firm property is co-ownership in its most complete form.

The simplest form of co-ownership is a tenancy in common, where each tenant has a separate and complete title to an undivided purpart. No single co-owner has any right of disposition of the common property as a whole, nor any right to its exclusive enjoyment. But he has absolute control over his own interest, and an independent right to his proportion of the fruits of the property.

The law affords numerous examples of modifications of this simple form, in all of which the tendancy is towards a distinction of the individual rights. Ownership consists of the exclusive right to enjoyment, and the exclusive right of disposition. A man's right of dominion is destroyed *pro tanto* whenever another is admitted to share the enjoyment in, or exert rights of disposition over, the property. An easement limits the enjoyment, and a mortgage impairs the right of disposition.

The destruction of individual rights in the complicated forms of co-ownership consists in this: that the prerogatives of the several owners interlock, and each

obtains a qualified dominion over the purparts of the others. The case of executors is an illustration, where each executor may exert the full right of disposition over the property. But the interlacing of individual rights, it is obvious, must have a limit, for should it cover the whole scope of ownership, the conflicting rights would be self-destructive. Co-ownership would be replaced by a kind of lottery, in which the most expeditious would take the whole.

Passing from the analytical to the historical point of view, it will appear that the process of developement has been from the complex form of co-ownership, in which individual rights are imperfectly recognized, to the simple form in which each individual owner's right of property is complete in itself, and untrammeled by that of the others.

Two methods existed, at the Common law, for several persons to hold property together. They might be joint tenants, or tenants in common. Both hold by joint possession, but tenants in common have separate titles, while joint tenants hold by a single title. The terms are antiquated, and out of place, in speaking of personal property, and especially of merchandise, because they recall the technical incidents of Feudal estates; but when stripped of the technical husk, joint tenancy defines, with exactitude, the combination of co-proprietorship with co-possession, which is the gist of the partnership title, and makes history reveal the origin and growth of the modern relation.

§98.

Joint tenancy represents the transition from the family, or tribal, title of primitive law to the individual title of modern times.

In the earliest period there was, practically, no separate ownership.[1] The property rights of the individual were enjoyed only in and through the family of which he was a member. The joint tenancy of the Feudal law, was a lingering trace of this primitive notion, and enabled persons to hold property in private ownership, without at once breaking with the tradition of communal holdings.[2] When the law passed into its analytical stage, and it became necessary to define the legal conception of the joint tenancy, the influence of its origin is seen in the theory of a single title for the several tenants. As at first the law denied to the individual separate and exclusive property rights, so, at a later date, the jurist denied to the joint tenant a separate and distinct title. In joint tenancy, at the Common law, there were many owners and one title. The tribal relationship excluded private property, and with it the devolution of property by inheritance. Joint tenancy accomplished the same thing among the co-tenants by the principle of survivorship, which was the result of the single title. This theory of a single title was an abstraction, which neither embodies the facts nor meets the requirements of logic. As the institution of private property became universal, different habits of thought were developed, and tenancy in common appeared as a modification of joint tenancy, more consistent with prevailing ideas. In tenancy in common there were many owners, each of whom had a

right of enjoyment covering the whole property, but with a separate and distinct title. As a consequence of the several titles, the right of survivorship was wanting in this form of co-ownership. Neither of these forms was serviceable for anything more than for the holding of property, and could not, without modification, meet the requirements of the partnership relation. Partnership demands a theory of ownership which secures to each co-owner the right to dispose of the whole property. Neither tenancy in common nor joint tenancy could furnish this essential prerogative.

1. Ancient Law, by Sir HENRY SUMNER MAINE, K. C. S. I, LLD., pp. 260 *et. seq.* 6th ed.; 1876.

2. Elements of Law, by WILLIAM MARKBY, D. C. L., 3d ed., § 516, 1885.

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§99.

The partner's title is an adaptation of joint tenancy to commercial purposes.

To meet the requirements of partnership, the Profession took up the institution of joint tenancy, with which it was acquainted, and adapted it to the novel relation. Common lawyers were familiar with the process of moulding feudal estates to meet the requirements of a new legal situation.

The adaptation of joint tenancy to commercial purposes involved an abridgement of some of its incidents, and an enlargement of others. Survivorship continued to be recognized,[1] but only until the close of liquidation.[2] Although the separate title of the partner was recognized, it could not be made effective until

after dissolution. During the continuance of the firm, each partner has an estate in the property, which enables him to convey a good title to any portion of the firm stock, without reference to the title of his copartner. This power of sale is not the result of any relation of principal and agent between the partners, but is an incident of the estate. This makes the partnership title an example of co-ownership in its most complete form.

Starting with this fundamental conception, the law of partnership is a developement of the joint estate. From this notion of the joint estate the partner derives his powers, and the creditors derive their rights. The prominence given to the estate in the partnership plan prepared the way for the derivative rule that the creditors of the firm were entitled to a preference over separate creditors in the distribution of firm assets. It was the firm property embarked in trade, which was the legal debtor, just as a landed estate when subjected to the claims of creditors became, in contemplation of law, an independent debtor. The right of the firm creditors cannot be explained by any theory of destination, for that is an equitable doctrine, and insufficient to explain a Common law right. It has sometimes been asserted that the creditors' privilege is the result of equitable doctrines. But, in reality, it it is simply an instance, in which equity has followed the law. There is nothing abnormal in making the firm estate the starting point of partnership law. The Common lawyers habitually measured a man's capacity by his estate. According to their habits of thought, the estate was the principal, and the individual the accessory. It is not difficult to understand

this mental bent, when it is remembered that their legal and social structure was nothing but methodized land tenures.

1. *Right of action accrues to surviving joint tenant.* A and B, executors of C, brought writ of account against D, bailiff of C. D's defence: Non-joinder of executors of C's co-tenant E. D argued: 'If two merchandise in common, and one dies his executors shall have a moiety.' Plaintiffs replied, that a chattel in possession was not a chattel in action, which could be severed, and executors of deceased could not join survivor.—The writ was adjudged good. The judge, correcting counsel's statement of the Law Merchant, said: "This is the law of "two merchants, who have goods in common: If one dies the other "shall have the whole by survivorship." 38 Edward III., p. 7 Accompt: 1365.

2. Lord ELDON speaks of the determination of a partnership "by the "death of one partner, in which case the law says, that the property "survives to the others. It survives as to the legal title in many "cases; but not as to the beneficial interest." Crawshay v. Collins, "*supra* §43, n. *a:* 15 Vesey 227 (1808).

§100.

The rights of creditors depend upon the joint estate of the partners.

It is important to distinguish between the partner's joint tenancy or tenancy in common, in order to ascertain the rights of third persons, by seeing whether they deal with joint owners, or with separate owners.

If the possessors have separate titles, that is to say, are tenants in common, the possession, though joint, is by construction of law, the possession of each for a moiety. Then one who has possession of the property holds half for himself and half for his co-partner. The possession is according to the titles.[1] The consequence of this severance would be that each partner would dispose of his own title and deal with

it alone in his firm transactions. If he should act for his co-partner's share, it would be as his representative. The effect of individualizing the partners as to their titles in firm transactions affects creditors. The separate creditors of each partner would be brought to the rank of firm creditors, or, rather, firm creditors would be put into the position of separate creditors of each partner.[2] It would happen in this wise:

The law recognizes no capacities in an individual. A partner binds himself by a firm contract in his separate estate. He becomes a debtor as an individual as well as a partner. Conversely, on the hypothesis of a tenancy in common, if he contracts on his individual account, he charges his property in the firm. If this property is owned in severalty, though occupied in common, the separate creditor is entitled to seize it by execution, and have the purparts set out, so that he can be satisfied out of his debtor's property. Both joint and separate creditors have the same right of access to the partner's quota in the firm and to his separate estate. They would come in *pro rata* upon each fund.[3]

On the other hand, the joint ownership of firm property changes the rights of third persons. Neither partner has the right to deal with any portion of the firm property, except in a firm transaction. A separate creditor, too, has no claim to any specific piece of firm property, for his debtor has no tangible interest in severalty.[4] The firm property belongs, in the first instance, to the firm creditors, and they also have an equal right against each partner's separate estate, with his separate creditors. But how does the right of the partners to effect a joint ownership, which prefers

joint creditors and cuts out separate creditors, arise? It is by the Common law, which created a joint tenancy. This species of estate survived the Feudal system, and was adapted to commercial uses.[5] By means of it the refusal to recognize the right to trade in the capacity of a partner was circumvented, and a substitute for it was devised. Wherever an individual is doing business in any particular capacity, or relation, as partner, executor, trustee or guardian, there are two methods of measuring his liability. He may upon one theory of law, be held personally liable to the full extent of his resources for all acts done by him in that capacity, or his responsibility may be limited to the fund over which he has control, as an incident to his relation. The latter was the *persona* of the Roman law, and involved a preference upon the particular fund in favor of those who had dealt with him in his special relation. The Common law, in all cases, took the first view, and refused to recognize any limited liability whatever. This is what is meant by saying, the Common law refused to recognize 'acting in a capacity.' As the individual's liability could not be limited to the particular fund, it followed, conversely, that he could create no preference upon that fund to creditors who had dealt with him in his special capacity. These creditors stood upon the same footing with all his other creditors. Some alternative had to be devised to give the joint creditors of a partnership a preference upon the firm fund. The indivisibility of a person at law made it necessary in lieu of the legal conception of a *persona* or capacity to find out an equivalent; which was done in part by the expedient of joint tenancy. The Feudal lawyers went to work,

in a back-handed way, and started from the point of view of title. Instead of controlling property by the person who exerts his capacity, they controlled the person by the property which he possessed. They looked at the estate as the principal, at the tenant as accessory, and they ascertained and defined his capacity by his interest in the land. Estates arise at law according to the interests to be subserved. A joint tenancy resulted from the union of the partners, and took its character from the purpose of the joinder. The contract creates the relation of partnership, and invests the partners with an estate by entireties during the continuance of the firm, that is to say, until the final settlement of their account.[6] The relation, though founded upon contract, exists by virtue of the vested interests when once established, independent of the contract, which served as the occasion and means of its establishment. Each partner has a vested right, which no dissolution can destroy, to apply the firm property to the payment of the firm debts, and the priority of firm creditors upon partnership funds is nothing more than the sequestration of this vested right in their interest. The title is joint in its most complete form, as explained above, but neither partner can dispose of the joint property or any portion of it, or of his individual interest, except in subordination to the obligations of his relation, and in accordance with the rules by which it is governed. The separate creditors are bound to recognize the nature of the property, and their execution would not hold more than the debtor could convey.

A separate execution and levy upon the firm property create no lien upon the partner's interest. The

separate creditor seizes the firm property that he may satisfy the technical requirements of the writ, but he sells only the partner's share in the firm business. His share in the firm business is his portion of what remains upon dissolution after all the debts are paid. This share of the partner is a property right, which he holds in severalty, and, therefore, an asset for the payment of his separate debts. But it is not a right of ownership in severalty, and hence the interest which he has as co-owner of the firm property eludes the grasp of his separate creditor, and is exclusively reserved to answer the claim of the firm creditors until dissolution has destroyed the joint estate. It is not strictly true to say that a partner has no tangible interest as owner in the firm property. It is tangible for firm creditors, and is, in reality, the basis of their preference. He is undoubtedly a co-owner, logically speaking, and his right and interest as co-owner must be separate and peculiar to himself (§ 53). All that is meant by the phrase is that a partner's interest, as owner in the firm property, is not available for his separate creditors during the continuance of the firm.

The partners, in making their contributions, create for the firm a new estate. Each partner loses a part of his exclusive dominion over his contribution, and his co-partners acquire in it new rights of ownership. The partners assume the position and exercise the powers of co-proprietors over an integral stock. They still own the property as individuals, because the firm is not distinct from the members who compose it, but the nature of their estate is changed. The single partner has no longer any right to the separate enjoyment and control of his contribution, or of any por-

tion of the firm property. His rights as owner are modified and controlled by the rights of his co-proprietors, which extend to every portion of the stock. It is this want of absolute and independent ownership which withdraws his interest as co-proprietor from the grasp of his separate creditors. Were he absolute owner of his aliquot, though undivided, interest, his separate creditor might sell it on execution, and the purchaser would succeed the partner as co-proprietor. This is the case of a tenant in common. Furthermore, the purchaser would hold the title free from the firm debts, which would then assume the position of a lien, and from the claims of the co-partners, because, in the absence of a statutory provision, a judicial sale discharges all liens, and charges them upon the debtor's title.[7] But the sale of a separate partner's interest does not pass a title free from the claims of the partners and of the firm creditors. Hence it is evident that the partners have something more than an equity, and the creditors something more than a lien. By virtue of their rights as co-propietors, the partners hold the firm stock for firm purposes in defiance of the separate creditor's attack. Being themselves, equally with the debtor partner, owners of every portion of the firm stock, it is impossible for a separate creditor to sell the debtor partner's interest in the stock itself without infringing upon their title. The separate creditor may take the only property right of which the partner remains separate and absolute master, *i. e.*, his share upon dissolution. But the firm stock is impregnable to his attack, because sheltered by the title of the co-partners.[8]

1. *Tenancy in common enforced by execution splits partners' title into moieties.* B issued a separate execution against C, which was followed by a joint execution against C and D, but E, the sheriff, made no second levy under the joint writ. Subsequently, C and D became bankrupt, and A, their assignee, sued E for selling D's moiety under the joint writ. Defence: Stock already seized.—The seizure, in order to sell C's moiety, did not take D's moiety, which remained by construction of law in D's possession. Johnson v. Evans, 7 M. & G. 240 (1844).

2. The Civil lawyers are not less perplexed than the Common lawyers to find out how to give the firm creditors a preference upon the joint assets. The French resort to the fiction of making the firm a person. The legal person contracts debts, and charges its assets for payment. If the fiction had a legal basis for its existence, and was consistently carried out, a partnership would become a corporation. 1. The firm creditors would take the firm property, and no separate creditor would have a claim against it. 2. The firm creditors would have no claim against the partner's separate estate, which would be liable only to their individual creditors. 3. The firm might be bankrupt, without involving the partners in the proceedings. 4. The firm might be solvent, although all the partners were bankrupt. 5. The partnership would not be dissolved by a change of partners.

„Soll nun die Behauptung, die Handelsgesellschaft sei eine juristische
„Person, irgend welchen Sinn haben, so müssen auch die Grundsätze und
„Folgerungen, welche sich nothwendig aus dem Wesen der juristischen Per-
„son ergeben, auf sie Anwendung finden. Man müßte demgemäß auf fol-
„gende Hauptsätze kommen:

1) "Die Societätsgläubiger halten sich zu ihrer Befriedigung allerdings
„an das Societätsgut, und schließen davon die Gläubiger der einzelnen
„Gesellschafter aus; aber, wie schon oben angedeutet, im gleichem Augen-
„blick und unzertrennlich von diesem Satze, ergiebt sich auch:

2) „Die Privatgläubiger befriedigen sich, mit Ausschluß der Societäts-
„gläubiger, aus dem Privatvermögen der einzelnen Associés.

3) „Die Gesellschaft kann in Concurs gerathen, ohne daß über die ein-
„zelnen Gesellschafter der Concurs ausbricht, da die Schulden der Gesell-
„schaft die Mitglieder, aus denen sie besteht, nicht berühren.

4) „Die Gesellschaft kann solvent bleiben und fortbestehen, wenn auch
„alle Gesellschafter in Concurs fallen.

5) „Die Gesellschaft besteht als die gleiche mit ihren Activen und Passiven
„fort, wenn schon ihre Mitglieder sich verändern.

„Von der im gegenwärtigen Handelsrechte bekannten und speziell aus-
„gebildeten Handelsgesellschaft gelten aber, allgemein anerkannt, ganz
„andere Bestimmungen, und diese Grundsätze auf sie anwenden, hieße ihr
„innerstets Wesen zernichten und sie zu einem völlig andern Institute
„umgestalten."[a]

a. Das Verhältniß der Societätsgläubiger zu den Privatgläubigern im Concurse der offenen Handelsgesellschaft, pp. 7–8., von Johannes Hürlemann, Cantonsprocurator, Zürich, 1846.

What is the polarity of mind of a lawyer who advocates making a partnership by turns a corporation and a number of individuals?[b] If he comprehended the elemental distinction of kind, he would not expose his confusion by making the suggestion, but he would disguise the proposition in the jargon of lawyers, who speak of a man *quo modo* a horse.

b. The Law of Partnership, ch. x. § 1., by THEOPHILUS PARSONS, LL.D.

3. The firm creditors are entitled to no privilege, unless a legal basis exists for the preference. The Civil law does not furnish any legal ground for the privilege. The result is a *pro rata* distribution among all the creditors, joint and separate, of each partner.

„Es frägt sich, wem gehört das Gesellschaftsgut? Darauf kann nicht „anders geantwortet werden, als den Gesellschaftern *pro rata*. Wer „haftet für Gesellschaftsschulden? Antwort: die Gesellschafter. Diese „haften allen Creditoren mit ihren sämmtlichen Activen, liegen diese „wo sie wollen. Der fragl. Vorzug muß so als Privilegium aufgefaßt „werden. Diese Auffassung ist dadurch bedingt, daß im gemeinen deutschen „Recht, und der Natur der Sache nach, die G. keine jur. Person ist, und „als solche also kein Vermögen und keine Schulden hat. Jede andere Auffassung des fragl. Vorzuges, sie mag nun in Worte gekleidet werden, wie „sie wolle, führt wieder dahin, daß die G. als eigne Person Rechte und „Verpflichtungen getrennt von denjenigen ihrer Mitglieder habe."[c]

c. Hürlemann, Das Verhältniß, p. 88.

4. *Partner's title as joint tenant runs through the firm stock.* A brought trespass against sheriff and plaintiff in execution against B's interest in A & B's livery stables for taking possession of the stock by means of a sheriff's sale. The defendants pleaded "not guilty," and denied A's right to recover without B's joinder.—A recovered; his title good to all the firm property, and unless B's non-joinder pleaded in abatement the objection is waived. Deal v. Bogue, 8 Harris, 228, Pa. (1853).

5. *Interest no bar in suit against surviving partner. Deceased partner not an assignor.* B & C, partners. B died. A sued C, as surviving partner, for money lent, and testified that the loan was made to B for the firm. Defence: A incompetent, because C is assignee of B, deceased, and is deprived of his testimony.—A competent. C not assignee of B, but original joint tenant, with him, of the firm property. Tremper v. Conklin, 44 N. Y. 61 (1870).

6. The joint estate does not come to an end until a settlement of the account between the partners has been completed, and the separate interests of the partners have been ascertained. The Common law process of execution was inadequate to bring about the ascertainment of a partner's share in the joint property. A summary remedy was at first permitted. "If there were two partners, and a * creditor of one got judgment and

execution against him, and levied it upon the partnership property, of which the sheriff (although he seized the whole) sold one-half. If there were three, he sold one-third; if four, one-quarter."[a] Lord MANSFIELD corrected and supplemented the process by making an account in equity incident to the execution. His practice has become the law.[b] The share may now be sold without ascertainment, when the purchaser buys the right to an account, or a pig in the poke,[c] or the share may be ascertained in advance, and the sale will be made to a purchaser who knows what he is buying.[d]

a. A Treatise on the Law of Partnership, p. 342, 2d ed., 1870, by THEOPHILUS PARSONS, LL.D., who reviews the history of the proceedings on a separate execution, and cites the authorities.

b. *Separate execution does not seize specific articles of firm property.* A recovered judgment against B and C, and levied on articles belonging to C & D. D interpleaded, and jury, under instructions from court, gave A 1-2 the property, and assessed its value at $150. Subsequently, C sold all to D, for antecedent debt.—Error. C had no title to any specific articles. Tait v. Murphy, 2 S. Rep'r 317 (1887).

c. *Purchaser of partner's interest gets nothing but a right to an account.* A bought at sheriff's sale B's interest in newspaper establishment of B & Co., and let it to B, reserving rent. On B's default in payment of the rent, and his refusal to deliver up possession, A brought a bill which court sustained, and also issued a *habere fa.*, and afterwards a writ of assistance, which the sheriff executed.—A entitled to no part of firm property, and proceedings below without any warrant in law. Durborrow's Appeal, 3 Norris 404, Pa. (1877).

d. *Partner's share cannot be sold until ascertained.* C levied on stock of A, B & Co. for B's debt. A enjoined C from selling until B's interest could be ascertained in Chancery.—Firm title a unit, and, until liquidation, no ascertainment of partner's quota. No sale in chancery of unknown purpart. Place v. Sweetzer, 16 Ohio 142 (1847); Nixon v. Nash, 12 O. St. 647 (1861).

7. *Sale against heir within seven years discharges lien against ancestor's estate.* B left his estate, by will, to children, C, D, E, F and G. F died in 1807, leaving debts, which H, his executrix, paid. She applied, in 1810, to O. C., which made sale of F's interest, for the payment of his debts to I. G also died, without issue, before 1808. In 1808, the interests of C, D and E had been sold separately, at sheriff's sale, to A, upon judgments recovered against each of them. The lien of E's debts was discharged by the sheriff's sale. Luce v. Snively, 4 Watts 396, Pa. (1835).

The difference of estate is necessary to prevent the sale from discharging liens.

Sheriff's sale against heir passes no title against subsequent Orphans' Court sale of ancestor's estate. Walker died in 1856. His property descended to his son Samuel, against whom judgment was recovered, and the property sold at sheriff's sale. In 1860, the same property was sold under decree of O. C.—Purchaser at sheriff's sale had no claim to the land as against one who bought at the O. C. sale. If heir takes estate subject to debts of the decedent, the heir becomes

the debtor instead of the ancestor, and the creditors are co-ordinated. Horner v. Hasbrouck, 5 Wright 169, Pa. (1861).

8. *Although sale of moiety is fraudulent, sheriff can't sell article. Undivided title protects both parts.* C, a dealer in kindlingwood, became indebted before March, and sold out his business to A & B, making two bills of sale. B paid for his half in cash, A, C's son, in notes. Creditors of C obtained judgment in June and levied on horse. Sheriff sold and delivered possession. A & B obtained judgment in trespass against sheriff.—Affirmed. Sheriff could not sell, at best, anything but A's interest, as B paid full value, and delivery of horse charged him. Plaintiff had joint interest, which sustained action, though only in a moiety. Farrell v. Colwell, 1 Vr. 123, N. J. (1862).

Partner in possession of firm assets after dissolution, a trustee, and cannot buy at his own sale, even through another. A and B dissolved in 1861. They owned an uninsured share in the bark "Ocean Rover," destroyed in 1862 by the "Alabama." In 1865, after A's insolvency, B, as solvent partner, sold the firm assets at auction. A bid for the share, but it was bought, at B's request. by C, who, under a secret agreement, resold to B. The government awarded $1564 compensation for the loss. A claimed half the award.—Recovered. B, a trustee of the late firm's assets, and could not hold under a purchase made by another for him. Jones v. Dexter, 130 Mass. 380 (1881).

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§101.

Partnership is a status.

By status is meant, in general, the sum of the rights and duties of an individual in a given, political or social relation. It may be, and generally is, independent of contract, or it may arise through the consent of the individual. A man's status as a citizen, or as a father, does not depend upon contract. His status as a husband, or a partner, is the result of his consent. As status is the result, which the law attaches to certain political or social facts connected with the individual, it cannot, strictly speaking, be dissolved at will, because the individual cannot change the facts upon which his status depends. The citizen cannot alter birthplace, nor the father overcome the fact of his

paternity. The law may and often does provide for the abrogation of the status upon the subsequent conjunction of a different state of facts.

As the consent of the individual may be an essential fact in the creation of the status, so, too, his change of purpose may be the effectual fact in bringing about its abrogation. But this is a matter of special legal provision. Marriage cannot be dissolved at will. Partnership may be dissolved at will. But though partnership may be dissolved at will and the relation brought to a close through the act of the individual, yet the status, with all its attendant duties and prerogatives, subsists until it is terminated in a manner consistent with its original purpose.[1] While the partner may dissolve the firm at will, and compel immediate liquidation, he cannot, before the final settlement of accounts, impair any of the prerogatives of his co-partners, or devest himself of any duty by the simple withdrawal of his consent to the continuance of the relation. Herein is the difference between partnership and agency. Agency is not a status, but a contractual relation. The prerogatives of an agent depend upon the continuing consent of his principal, and cease the instant that consent is withdrawn.

The elevation of partnership into a status, is due to the presence of a firm estate. Since the rights and obligations of partners as individuals are measured by the estate, which is an extraneous fact, the notion of this contractual relation is necessarily subordinated to the idea of status.[2]

The partners being merged as individuals in the firm estate, are enabled to trade in a distinct capacity. The estate is set apart and dealt with by its proprie-

tors as a separate fund. Any transaction by either partner, not connected with the estate, does not bind it, or enable the creditors to proceed against it. The partners, when acting for the firm, are isolated by the estate from other transactions, and the isolation is equivalent to giving them capacity to trade as partners, the *persona* of the Roman law. The only qualification is, that in acting as partners they bind their separate estates, and the firm creditor is not confined to the firm fund. The withdrawal of the partnership property from the partner's general estate could not be accomplished by contract between the partners.[2] The contract serves as the occasion for the creation of a status, as in marriage, but the relation, when created, establishes rights and duties which are paramount to the contract. It is the recognition by the law of the estate, that severs the partner from himself as a man.

1. *Partner's right to wind up business.* A bought out a partner's interest, and was admitted, by continuing partner, to joint liquidation. A applied for a receiver, because B made settlements without his consent.—Bill dismissed. A, though admitted to equal rights in liquidation, was no more than a partner, and could not restrict B's control over the business. Van Rennsselaer v. Emery, 9 How. Pr. 135, N. Y. (1854).

Appointment of receiver not of course in partnership at will. A & B, partners at will. A brought bill for dissolution and appointment of a receiver. B denied any cause for a receiver, and A insisted upon the appointment, as of course.—Refused. In partnership at will, appointment in court's discretion, and unless cause shown for taking business out of defendant's hands, chancellor will not break up business and saddle partnership with costs of settlement in chancery. Birdsall v. Cole, 2 Stock. Ch. 63, N. J. (1854).

Dissolution. Contract to sell machinery to highest bidder and divide product. On dissolution, partners agreed to divide chocolate on hand, and sell out machinery for its manufacture to the highest bidder. The chocolate was divided into two lots, and then the partners disagreed. A got judgment for his share of the assets against B.—Reversed. Contract not binding until carried out. Koningsburg v. Launitz, 1 E. D. Smith, 215, N. Y. (1851.)

Appointment of receiver refused unless ground laid. A & B, at F, in partnership with C & D, at E, dissolved. A & B asked appointment of receiver, because C & D misappropriated firm assets at E,

and refused to pay notes at bank, for $10,000, or meet A & B for settlement. C & D admitted refusal to pay notes, but denied conversion of assets, or refusal to meet A & B.—Appointment refused. No evidence of bad faith. Coddington v. Toppan, 11 C. E. Gr. 141. N. J. (1875).

2. Dr. KUNTZE thinks the joint estate of the partners forms the legal basis for the transactions of the business, and gives the partnership a standing apart from the individuals who compose it. The article of KUNTZE is published only in a German legal periodical,[a] which is inaccessible to foreign readers. Dr. KAH thus states KUNTZE'S view:[b]

„Er findet das Wesen der wirthschaftlichen Genossenschaft weder in der „Societät noch in der Collectivgesellschaft, sondern in einer Stiftung: *universitas bonorum*, einem personificirten *patrimonium*. Der Rechtsgrund hierfür besteht ihm darin, daß einestheils der Schwerpunct bei der „Genossenschaft in ihrem Vermögensbestand ruhe, anderntheils ihr Zweck—„anders als bei der Corporation—auch von einem Individuum erreicht „und verfolgt merden könne. Das Organisationsprincip der wirthschaftlichen Genossenschaft besteht nach Kuntze in der Verbindung einer abstracten Vermögenspersönlichkeit und der Gesammthand, *conjuncta* „*manus*."

a. VI. Zeitschrift für das gesammte Handelsrecht. S. 220–229.

b. Beiträge zum Recht der Erwerbs- u. Wirthschafts-Genossenschaften, von Dr. Bernhard Kah. p. 33. 1882.

3. Dr. HÜRLEMANN'S position is that as partnership originated in the Roman law, and has extended with its development, the principle of its organization must be found in that system of law. He denies that any basis exists in the Civil law for a joint estate which will secure the firm creditors a preference in its distribution. The right of individuals to set apart property, and form a joint mass, which should be kept for their joint creditors, did not exist at the Roman law. 1. The fiction of a person he discards a makeshift. 2. The privilege of the joint creditors he denies, because it has no legal foundation. 3. The analogy of the *peculium* he shows to be far-fetched and unfounded.

„Rechtlich gehörten die Peculien noch immer zum Vermögen des Herrn und „konnten von diesem nach Belieben eingezogen werden; man neigte sich aber „immer mehr der Ansicht zu, den Sklaven oder Sohn, mit Rücksicht auf die „Peculien, als selbstberechtigt zu halten. Durch Handlungen des Sklaven „oder Sohnes wurde der Herr, resp. Vater, gegen Dritte gar nicht verpflichtet, „(es wird hier von den Delikten abgesehen), wenn nicht ein besonderer Grund „zur persönlichen Haft hinzu kam, z. B. Befehl, *in rem versio* u. dgl. Eine „strenge Durchführung dieser Rechtsgrundsätze wäre unbillig und hart erschienen. Der Herr hätte das Peculium als sein Eigenthum behalten und die „Gläubiger des Sklaven leer weggeschickt. Der Prätor half im Edikt. Er „bestimmte, daß die Creditoren des Sklaven (was von diesem gesagt ist, gilt „immer auch vom Sohne) sich wenigstens an das Peculium halten können;

„der Herr soll durch die Handlungen seiner Untergebenen, wenn nicht unbe„dingt, doch so weit die Peculien reichen, verpflichtet werden. So entstand die „*actio de peculio*. Juristisch war es immer noch der Herr, welchem das „Eigenthum an den Peculien zustand, doch durfte er dieselben den Creditoren „nicht ganz vorenthalten, sondern nur den Theil, welchen er selbst allfällig „von dem Sklaven zu fordern hatte. Faktisch gestaltete sich die Sache so, als „gehöre das Peculium nicht mehr dem Herrn, sondern dem Sklaven. Es schien, „als übe der Herr nur das Recht aus, das Vermögen eines Andern zu theilen, „und als stehe ihm ein *privilegium deductionis* zu für dasjenige, was er „selbst zu fordern hatte. Sein Eigenthumsrecht erschien als Distributions„recht und Privilegium.—Die beschränkende Richtung machte weitere Fort„schritte. Wenn der Herr zugab, daß der Sklave in eigenem Name ein „Handelsgewerbe trieb, so willigte er dadurch ein, daß das Peculium oder „wenigstens ein Theil desselben dazu verwendet, mithin größern Gefahren „ausgesetzt werde; es war daher billig, daß auch er diesen Chancen ausge„setzt sei und für seine Forderungen nicht durch das *privilegium deduc„tionis* völlig gesichert bleibe. Der Prätor half auch hier und bestimmte „in seinem Edikte, wenn ein Sklave mit Vorwissen seines Herrn Handlung „treibe, so verliere letzterer sein *privilegium deductionis* und concurrire „bei Vertheilung der *merx*, oder des zur Handlung verwendeten *peculi„ums*, mit allen übrigen Gläubigern des Sklaven. So entstand die *actio „tributoria*. Das Eigenthum des Herrn äußert sich nur noch in seinem „Distributionsrechte. Beide Klagen sind aus derselben Quelle entsprungen, „ruhen auf demselben Princip, Begünstigung der Creditoren des Sklaven „gegenüber dem Herrn. Diese ist am bedeutendsten bei der *actio tributoria*. „Der Herr wird dadurch einem *extraneus creditor* gleichgestellt; er ver„liert sein Vorabzugsrecht. §. 5. *I. quod cum eo, qui in al. pot:* "*In „tributoria actione domini conditio praecipua non est, id est, quod „domino debetur, non deducitur, sed ejusdem juris est dominus, „cujus et ceteri creditores.*" Dieses Princip ist in den Pandekten auch „an die Spitze des Titels "*De tributoria actione*" gestellt (*l. 1. pr. h. t.*) „und bei Entscheidung schwieriger Fälle stets als Norm gebend zu Hülfe „genommen. So z. B. in *l. 5. §. 7 h. t.* von **Ulpian**. Der dem §. 15 „dieser *lex* angehängte spezielle Grund kann wesentlich nichts Anderes aus„drücken, als das der ganzen *actio* zu Grund liegende Princip. Und so „ist es auch. Während der an die Spitze gestellte Satz, der Herr verliere sein „*privilegium deductionis* und stehe den andern Creditoren gleich, die recht„liche Stellung der Creditoren des Sklaven zu seinem Herrn bezeichnet, „zeigt der dem §. 15. beigefügte Grund (*merci magis quam ipsi credi„dit*), wie sich das mit Beziehung auf die *merx* im Leben faktisch gestalte. „Dieser Grund bezieht sich ebensowohl allgemein auf alle Bestimmungen „der *actio tributoria*, als nur auf den betreffenden §. Wenn nämlich „Jemand mit einem Sklaven contrahirte, so wußte er, daß er gegen ihn „sebst entweder seine Ansprüche gar nicht oder doch nicht sogleich klagend „verfolgen könne, daß auch der Herr nicht unbedingt hafte. Nur die *merx* „konnte ihm einige Garantie geben und ihn zum Creditiren ermuntern, „denn aus dieser mußte er bezahlt werden. Dafür diente ihm die *actio tri„butoria*, und man konnte wirklich mit Recht sagen, man creditire mehr der „Handlung als dem Sklaven (*merci magis quam ipsi servo*). Ganz auf „gleiche Weise muß bei der *actio de peculio* gesagt werden, die Gläubiger „creditiren *peculio magis quam ipsi*. Das gilt, wenn ein Sklave eine „Handlung hatte, ganz ebenso, wie wenn er zwei und mehrere hatte. Die „Creditoren halten sich natürlich an die *merx*, rücksichtlich welcher sie cre„ditirten. An die Stelle des *ipsi* darf nur der *servus* oder wer *alieni juris* „ist, auf den die *actio tributoria* also sich bezieht, gesetzt werden, durchaus „Keiner, der *sui juris* ist. Für römische Kaufleute *sui juris*, so wie für „unsere Kaufleute, fehlen alle Fundamente der *actiones de peculio* und „*tributoria*, welche hauptsächlich sind: die römische *potestas* und das

„römische Peculiensystem, und die Bestimmungen derselben haben nur noch „antiquarisches Interesse für uns. Der contrahirende Kaufmann wird „selbst klagbar verpflichtet und nicht ein Dritter; er haftet unbedingt, nicht „bloß so weit die *merx* reicht." Hürlemann, Das Verhältniß, pp. 73–6.

The right to keep distinct, trades carried on by different freeman, who acted for the proprietor, was unheard of.

"Es konnte wohl nicht selten sein, daß ein Kaufmann mehrere Geschäfte „hatte und für jedes besondere Institoren. Da ist aber keine Rede davon, „daß die Gläubiger des einen Etablissements Separation von denjenigen „des andern verlangen können, noch weniger davon, daß die Gläubiger einer „einzelnen Handlung Separation von den Nichthandlungsgläubigern des„selben Kaufmanns ansprechen können. Wir haben da einen Schuldner, „welcher unbedingt allen seinen Creditoren mit seinem ganzen Vermögen „haftet. Die Verhältnisse, auf die sich besonders die *actio institoria* stützt, „leben noch bei uns fort und zeigen sich besonders bei der H. G. So um„sichtig und detaillirt durchgeführt, wie im römischen Recht, bemerkt Thöl, „ist die Lehre vom Institor nirgends, auch ist kaum ein Satz derselben „unsern heutigen Verhältnissen widerstrebend." Hürlemann, Das Verhältniß, p. 79.

The contrast between the position of a Roman slave and a modern trader, is pointed out by HÜRLEMANN, and the analogy relied upon by the advocates of a privilege for the firm creditors confuted.

„In jener Stelle Ulpians (l. 5. §. 15) und in der *actio tributoria* „überhaupt ist nicht der contrahirende Sklave der Verflichtete, sondern ein „Dritter, der Herr: heutzutage aber derjenige, welcher Inhaber der Hand„lung ist. Dort haftet der Herr nur bis auf den Betrag der Handlung „(*merx*): bei uns haftet der Kaufmann unbeschränkt mit seinem ganzen „Vermögen. Dort ist der Inhaber der Handlung ein *alieno juri sub*„*jectus*, welcher kein Eigenthum hat, in der Regel nur ein vom Herrn con„cedirtes *peculium:* jetzt ist der Inhaber der Handlung ein Freier, *sui* „*juris*, und diese ist sein Eigenthum. Dort ist von mehreren Handlungen „(*tabernas*) die Rede: wir nehmen dafür nur eine an. Es sind dort die „H. Gl., die mit Bezug auf die eine Handlung creditirten, den H. Gl. der „andern Handlung gegenüber gestellt: wir wollen einfach H. Gl. den „P. Gl. gegenüber stellen. Die Bestimmung, daß die tributorische Klage „und die *actio de peculio* sich consumiren, ignoriren wir, und lassen, was „auf der *merx* nicht gefunden werden kann, auf dem übrigen *peculium* „suchen und nachholen.—Auf diese Weise gelingt es uns endlich, aus der „Bestimmung des römischen Rechts, daß, wenn ein Sklave mit Vorwissen „seines Herrn zwei oder mehrere getrennte Handlungsgeschäfte geführt hat, „die Creditoren Separation und Befriedigung aus demjenigen Geschäft „verlangen können, rücksichtlich dessen sie creditirt haben, für unsere Ver„hältnisse folgenden Grundsatz abzuleiten: Wenn ein Freier eine Handlung „hat und insolvent wird, so können die H. Gl. Separation und ausschließ„liche Befriedung aus dem Handlungsgute, gegenüber den Nichthandlungs„gläubigern, so wie für Nichterhaltenes Concurrenz mit Letzern bei Ver„theilung des Privatgutes des Cridars verlangen Und das so geschaffene „Ding heißt dann 'eine durch die veränderten Verhältnisse bedingte Aus„dehnung der Bestimmungen des römischen Rechts.' Wollte man bei „Interpretation von Gesetzen so verfahren, so ließe sich nicht absehen, wie „weit das führen würde. Jeder erdenkliche Satz, den gute oder üble Laune „zufällig in irgend einem Kopfe erwecken würde, fände so seine Begründung „im römischen Recht; abgesehen davon, daß das Auffinden von Grund„

„ sätzen im *Corpus Juris* noch nicht genügt, deren Anwendung im Leben zu „ behaupten.“ Hürlemann, Das Verhältniß, pp. 83–4.

HÜRLEMANN sums up the Commercial law, apart from Codes, in the following propositions:

„ Für das gemeine deutsche Handelsrecht stehen nunmehr folgende Rechts- „ grundsätze fest:

1) „ Die Handelsgesellschaft ist keine juristische Person. „ Sie hat als solche weder eigne Rechte noch Verbindlichkeiten, sondern die „ einzelnen Mitglieder derselben sind es, die in allen Verhältnissen, welche „ die G. betreffen, selbst und allein als berechtigt und verpflichtet erscheinen.

2) „ Sie ist nach den Regeln des römischen Rechts über „ Societät, wovon sie eine Art ist, zu beurtheilen; sie hat nur das „ Eigenthümliche, daß solidarische Verbindlichkeit aller Mitglieder als Regel „ gilt. Für diese Eigenthümlichkeit finden sich Analogien im römischen „ Recht bei den Bestimmungen über das Institorenverhältniß. Die Ver- „ muthung einer gegenseitigen *praepositio institoria* kommt der Berechtig- „ ung zur Firmaführung völlig gleich.

3) „ Die Firma der Handelsgesellschaft ist nichts Anderes „ als die abgekürzte Bezeichnung aller solidarisch haftenden „ Gesellschafter.

4) „ So lange ein Mitglied solvent bleibt, ist auch die Han- „ delsgesellschaft solvent, und der Concurs der letzern ist nur der „ Concurs aller einzelnen Mitglieder. Es gibt also so viele Concurse als „ Mitglieder sind, und natürlich bei jedem eine eigene Concursmasse.

5) „ In die einzelne Concursmasse fallen die sämmt- „ lichen Güter des Gesellschafters, sein Antheil am Societäts- „ gut sowohl, als sein übriges, außer der Societät liegendes Vermögen, das „ sog. Privatgut.

6) „ Die S. Gl. müssen ihre Forderungen, wie die sog. P. Gl., in den „ einzelnen Concursen ihrer Debitoren, der Gesellschafter, anmelden. Jene „ können keinen Partikularconcurs verlangen; es steht ihnen weder „ ein Separationsrecht noch ein Privilegium irgend „ welcher Art zu. Alle Creditoron, diejenigen, welche der Gesellschafter „ als Societätsmitglied hat, sowohl als dessen P. Gl. kommen hier nach der „ allgemeinen Regel als gleichberechtigt zur Vertheilung der ganzen Masse.

7) „ Der Vortheil der Societätsgläubiger gründet sich „ einzig und allein auf die Eigenthümlichkeit der neuern H. G., näm- „ lich auf die Solidarität der Gesellschafter. Zufolge der- „ selben haben die S. Gl. nicht nur einen, sondern mehere Schuldner, „ und sie können ihre Befriedigung in den Concursen aller ihrer Schuldner „ suchen.“ Hürlemann, Das Verhältniß, pp. 101–2.

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§102.

Partnership, being a status based upon the firm estate, does not derive all its distinctive features from the contract of the parties.

Judge GIBSON advanced a notion, which makes partnership an anomaly in law: The partners seek, by an agreement between themselves, to bind third persons. The partnership property is withdrawn from the execution of a creditor, by a contract between a debtor and a stranger, to which the creditor was not a party. The partnership forms an exception to principle, and, as such, is tolerated only in favor of trade.[1] If it were not for the partnership's exceptional standing at law, the creditor of a partner would have a right in equity to the partnership property on equal terms with the firm creditors, limited, of course, to the portion of the firm assets which belongs to his debtor. If Judge GIBSON'S theory is accepted, and partnership is nothing but a contract, the rights of all creditors are reduced to equality, and as neither class has a priority upon the joint, or upon the separate, fund, distribution should be made without respect to the creditor's class. But this is unheard of. The joint estate is, in fact, awarded to the firm creditors, not as their right, but under the pretext of convenience in making distribution. The separate creditors are awarded possession of the separate estate, to the exclusion of the partnership creditors, in order to counterbalance the privilege of the joint creditors to appropriate the firm assets.

The inability of a partner to convey any title to a specific portion of the firm stock by a sale of his interest, voluntary or adverse, was to Judge GIBSON an anomaly. While compelled to admit the principle as an established rule of law, he was disposed to deny it any effect in determining the rights of joint and separate creditors.[2] A preference given to the joint cred-

itor upon the firm fund, was in his view, an unwarranted abridgment of the co-ordinate rights of the separate creditor.

The conception entertained by Judge GIBSON of a partnership was a tenancy in common. The partners, as debtors, have nothing to say about the method which a creditor shall adopt, in order to collect his debt. It is the privilege of the creditor to select his remedy. The debtor has no power to curtail his liability. The partners could neither restrict individual creditors to the separate estate, nor firm creditors to the joint assets. Both classes of creditors have an equal right to proceed against either kind of property which the debtor had. The separate creditor might go against the firm property, or a moiety of it, as his debtor's property. The joint creditor might proceed against the separate estate of his debtor. The only plan of distribution which would give effect to the equal right of every creditor, against his debtor's property, would be to marshal the assets, *pro rata*, among the individuals of both classes, without regard to the classification of creditors into joint and separate: the division would be equal from the start.

The reasoning of Judge GIBSON furnishes at best a superficial treatment of the partnership relation and the rights of joint and separate creditors. By his process the joint and separate are reduced to a dead level, on the ground that the Common law does not recognize the distinction which subsists between different interests, or *personæ*, when exercised by one person, though they are unconnected with each other, except through the link of a common individual. He maintained that a partner who trades in a firm charges

himself as an individual, and, in return, the individual who trades on his separate account charges himself as a partner. Now, it is true, the actions of the Common law were incompatible with different parties in one individual. A man could not be sued as a partner, but only as an individual. The obstacle, however, as an incident of procedure, vanishes in Chancery, where forms do not interfere with the administration of equity. There the lack of *personæ* is not felt, and the different interests are accorded a separate recognition. Back of the levelling which would be brought about by the oblivion of the Common law procedure to all distinction between partnership and individual interests, is the substantial right of the firm creditors, which is established at law and protected in equity.

Judge GIBSON put the firm creditors in a position not paramount, but subordinate, to the separate creditor. He said the partnership results from a contract. The partners could not, by a contract between themselves, restrict their individual creditors to any particular property, nor could they create any prior right in the firm creditors. In spite of the contract, the individual creditors should be permitted to proceed against the partners' joint property. If they are excluded from recourse to the joint estate, why should not the firm creditors be excluded from the separate estate? The real equity he maintained was in the separate creditor. An arbitrary act, without his consent, had cut him off from a portion of his debtor's property. He was entitled to be paid out of all, or any part of, the debtor's estate. If there should be any limitation, the joint creditor ought to be confined to the joint estate, or, admit that he could also claim

to be paid out of his debtor's separate property; then both must stand upon an equal footing. Such a conclusion would make tenancy in common the theory of partnership property. His doctrine of marshalling assets cannot be explained upon any other hypothesis. His plan of distribution is equality between different sets of creditors, not according to their class, but among all the individuals of each class *pro rata*.

If the true view of partnership had been carried out, the paramount rights of the partnership creditors would have been acknowledged to their full extent. Then the firm creditors would have had an undisputed right to all the firm property, and an equal right, with the separate creditors, to the separate estate. There would be no abatement, or deduction, of the partnership claims against the separate estate, by reason of what they had received as a dividend out of the joint estate. That would be an independent right, in addition to the claim against his separate assets. The idea of equality in distribution between the joint and separate creditors would be inconsistent with the rights of the parties, which are based upon precedence. The question of equality does not arise until the paramount claims have exhausted their fund, and seek satisfaction out of the common fund for both classes of creditors. The equality of distribution is limited to the separate estate, and justifies its division among all the creditors, joint as well as several, *pro tanto*. As this method of administering the assets has not been adopted, the true view of partnership has not prevailed in the plan of marshalling joint and several assets as finally established. The

reason for the departure from the true principle is stated in § 191, *et. seq.*

But it is not to be understood that the opposite view, as developed by Judge GIBSON, has maintained itself. By that theory, the separate creditor would go against the firm property, or a moiety of it, as his debtor's property. The joint creditor would have no better claim to it than the separate creditor has, and both would share their debtor's property between them. The division would be equal from the start. A direct access would be given to both classes of creditors against both joint and separate estates.

Underlying the attempts to equalize the distribution out of both funds is the notion of the individual responsibility of the partners. There is no distinction between a firm contract and an individual contract, in the matter of personal liability, and by easy transition it may be supposed that there should be no distinction made in application of firm and separate funds to the satisfaction of such contracts. The notion, though proper in itself, does not meet the case. The firm creditor enjoys a priority on the firm fund, not by reason of any difference between his contract with the parties and that of a separate creditor, but by reason of an independent and vested right, which he has acquired in the firm stock in consequence of its destination to his use by means of the joint tenancy of the partners.

Equity, by restricting each creditor to his special fund, recognizes the joint tenancy of the partners, and adopts the Common law rule, that members of a business firm do not contribute their separate estates to the partnership. The partners trade simply in their joint

capacity. But equity does not intervene to settle the basis of distribution, unless the partners have two funds. This is a distinct ground of equity, independent of partnership.[3] If there is but a single fund, no conflict arises for a court of equity to adjust, and the Common law prevails, with its theory of a paramount claim against the firm stock, and an equal title to the separate estate of the partners. The theory enables the firm creditors, if there is nothing but partnership property, to take it all; but if there is no firm property, to participate in the distribution of the separate estate with the separate creditors.[4] The right of the separate creditors is a doctrine of Chancery, where a joint creditor is not permitted to exercise his legal right except upon terms. The right of the firm creditors, as a paramount class, was asserted, and the restriction was made only as a matter of grace to the separate creditor. The right of pre-eminence existed at law, and might be enforced.

It is the refusal of the Common law to let individuals trade in the capacity of partners, without also trading in the same transaction as individuals, that gives to a partnership, at Common law, its eccentric features. A partner pledges not only the contribution which he makes to the firm stock, but his individual fortune in addition, by every firm engagement. As he cannot act in the capacity of a partner simply, but also acts as an individual, no distinction can be drawn between his liability as a man and his liability as a partner. Had the Common law adopted the universal partnership of the Civil law, in its full extent, and prohibited any dealings by a partner, except through the firm, the collision between joint and separate creditors would

not have occurred, for there would be no separate creditors, and no equity of a partner against a firm creditor.

A partner may, however, act, at Common law, on his separate account. He is not merged in the firm, as he is in a universal partnership, by the Civil law. The right to act independently of the firm, enables him to create liabilities, which charge his separate estate alone. Equity treats the debts incurred by a partner on his separate account as the primary burden of the separate estate, a principle unknown to the Common law, and only recently acknowledged as a right. At the Common law, joint and separate creditors stood upon an equal footing in reference to the separate estate, for the partner's personal obligation was the same in both cases. The prior execution took the fund. The Common law extension of the firm estate, so as to include a partner's separate property, which he did not contribute to the firm, and to subject it to the claim of firm creditors, is rejected by equity, if the privilege conflicts with an independent right against the separate estate. The theory which charges a partner as an individual, and binds his separate estate for a firm indebtedness, is recognized in equity only when the demand does not clash with a claim against the partner which arises out of an individual transaction.

1. "That a contract which enables the parties to keep a class of their "creditors at bay, and yet retain the *indicia* of ownership, should not "have been deemed within the statutes of *Elizabeth*, is attributable "exclusively to the disposition universally manifested by courts of "justice to encourage trade." GIBSON, J. C., in Doner v. Stauffer, 1 Pa., pp. 203-4 (1829).

2. *Separate execution creditors take the proceeds and the purchaser takes the firm stock.* B & C, partners. D *et al.* had separate executions against C, and, 11 August, 1825, levied on the partnership property. A *et al.* had separate executions against B, and levied on his share. The firm property was sold, under these and other executions, to E, for $4,779.

A feigned issue was granted, to find out who was entitled to the proceeds. D *et al.* claimed half the fund. A *et al.* offered to show that, 1, firm was insolvent at date of D's levy; 2, C had no interest, and, 3, B was entitled to marshal assets in relief of his liability.—Judgment for D *et al.* affirmed. GIBSON, C. J.: "They (the firm creditors) can "interfere at all, only on the ground of a preference which has regard "only to the partnership effects, and these have not been sold, but "only the subordinate interest of the partner, which was, strictly "speaking, his separate estate. Their recourse, therefore, is necessarily to the property in the hands of the purchaser. Now had the "sheriff sold the interest of but one of the partners, the execution "creditor would have clearly been entitled to the proceeds. But although he sold the whole stock at one operation, on separate executions against both, there was, in contemplation of law, a separate "sale of the interest of each. What then would have been the effect, "had these sales been made consecutively? The first, in the order "of time, would have passed the interest of the partner, subject to "the equity of his co-partner, and the execution creditor would have "been entitled to the price. But this equity, together with the re "maining interest of the other partner, would have passed by the "succeeding sale to the same purchaser; the execution creditor, in "that instance, also taking the proceeds. * Here * where the "shares of the partners are united in the same purchaser, every semblance of partnership equities is at an end. As regards the goods in "the hands of the purchasers, this is conceded." Doner v. Stauffer, 1 Pa. Rep. 198 (1829).

"I think," said Judge SHARSWOOD, in criticizing the case, "altogether too much was conceded when it was conceded that the goods "could not be followed into the hands of the purchaser. The sheriff "proceeded irregularly in selling as he did the effects of the firm under "the separate executions against the partners. But that made no difference; he could make no better title by lumping the sale, than "the writs of execution separately taken authorized him to make. "Had he sold consecutively the first purchaser would have bought the "interest of B subject to the joint debtors. The price would be proportioned to the hazard. It is agreed, however, that by so buying "he did not assume the joint debts so as to become personally liable. "The goods themselves, whether in his hands or in the hands of the "other partner, would be liable to execution for the joint debts."

Judge SHARSWOOD has traced Judge GIBSON'S misconception to its source, and shown that the partner's equity is founded, not upon the partner's share in the joint property, but upon his unlimited liability, which charges his separate estate. The equity enables him to marshal the firm assets for the discharge of his liability. The object, as well as the purpose, is to relieve his separate estate, which was not contributed to the firm stock, and is, nevertheless, made to answer for firm debts by reason of the unlimited liability imposed by law upon a partner for all firm engagements. The equity does not depend upon, and is not fed by the partner's interest in the joint stock, but springs from and is fed by his separate liability for firm debts. The equity,

therefore, is not a vendible commodity. No one is interested in buying exemption from a liability to which he is not exposed, that is, from another man's debts. In his exposition of the case, Judge SHARSWOOD said:

"On the sale of C's interest, what passed? The C. J. says, His "equity to have the joint property applied to pay the joint debts, "together with his remaining interest. I confess, this is wholly "unintelligible to me. I cannot conceive of this equity being a "saleable interest at all, of what value it can be to the purchaser, if, "as the opinion holds, all claim of the joint creditors on the goods is "gone by the second sale, and the purchasers hold them clear and "discharged, while, however, B & C still remain personally liable for "the partnership debts. Nor can I understand how on the sale of C's "interest, B's equity should be so entirely left out of view. He still "remains personally liable for the debts of the firm, notwithstand-"ing the sale of his interest, and his equity is equal to C's, to have "them appropriated to joint debts. I should say then that under "the second sale of C's interest, what passed and what alone passed, "was his share subject to the joint debts, exactly what passed under "the first sale of B's interest. I should say also that the goods "themselves would be subject to execution at the suit of the joint "creditors, or the proceeds of them in the hands of the purchaser "to attachment. If either of the partners were sued, or made to "pay out of their other property any of the joint debts, I should "think they would be entitled to subrogation in equity against "the joint effects. But the practical operation of the doctrines set "forth in the opinion in Doner v. Stauffer would be that the pur-"chaser, though buying an incumbered title under the first execu-"tion by the legerdemain of a second sale under an execution against "the other partner, is thereby vested with an absolute unincum-"bered title without paying for it, or what is worse, if the second "purchaser is a different person, he gets a clear title, and by the "same title clears the title of the first purchaser. Thus, by this pro-"cess, the separate creditors of the partner last sold out get the full "price of his share discharged of the debts, though he may be enti-"tled to little or nothing after the debts are paid, and his partner's "interest which has been sacrificed by a sale incumbered with an "uncertainty may be by far the largest. A decision to put the inter-"est of the partners, as well as the joint creditors, so completely at "sea, to the mercy of the winds and waves I think, I hope at least, "will never be made." Mss. Lectures at the University of Pennsyl-"vania.

Judge SHARSWOOD in this critique discloses his profound and accurate knowledge of the partnership relation. To detect and point out the reason upon which the partner's equity is founded, in spite of the misleading decisions upon this *questio vexata*, reveal his originality,[a] not less than do the conspicuous illustrations of which Mr. Biddle has given a résumé in his address upon the late Chief Justice of Pennsylvania.[b]

The decision of Judge SHARSWOOD upon the nature of the partner's contribution to the firm stock is another example of his insight into the relation. No authorities

were furnished to guide him in arriving at a conclusion, but his comprehension of the inherent structure of partnership, led him, by intuition, to the result which others had reached only by dint of study and reflection. (§ 34.)

a. *Sheriff's sale of partner's share does not pass his equity.* B's interest in B, C & D, sold on execution to E, who brought account. A attached stock in hands of C & D for C's debt. A, creditor of B, C & D, claimed payment of firm debt out of proceeds. Recovered.—SHARSWOOD, J.: "The idea which he puts forth (C. J. GIBSON in "Doner v. Stauffer) that the equity of the partner to have the part-"nership effects applied first to partnership debts, passes itself on the "sale of that partner's interest to the vendee by execution or other-"wise, is a curious illustration of the danger of hunting too far for a "reason. The equity of the partner is solely grounded on his lia-"bility for the debts, which continue after his interest is devested, "and is not transferred to his vendee. As the liability of the partner "to answer personally for all the debts of the firm is not extinguished "by a sale or devesture of his interest, so neither is his equity which "depends upon it. Here Thompson had an equity, of which the "partnership creditors can avail themselves; he never gave it up, nor "did he lose it by the sheriff's sale of his interest. He never con-"sented to the transfer of the assets to the remaining partners in "their new firm capacity." Brenton v. Thompson, 20 L. I. 133 Dist. Court of Phila. (1863).

b. The Judicial Character of Chief Justice Sharswood, an address delivered before the Law Association by GEORGE W. BIDDLE, Chancellor of the Association, 1883.

3. 2 WHITE & TUDOR'S Leading Cases in Equity; Aldrich v. Cooper, and notes upon it, p. 228, 4th ed., by Judge J. I. CLARKE HARE: 1877.

4. *If no firm property, joint creditors share partner's separate estate with his separate creditors.* B & C partners, insolvent, assigned for creditors, B and the firm to A; C to E. B's separate estate amounted to $27,241.18, and C also had separate estate. The firm assets were only $6.35, which would be consumed in costs. A brought bill against partners, and joint and separate creditors, to marshal the assets.—Firm creditors entitled to separte estate equally with separate creditors. Brock v. Bateman, 25 Ohio St. 609 (1874).

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§103.

The law has recognized and established the partners' estate as a joint tenancy.

The *jus accrescendi* applied, and the title survived in the living partners.[1] It did not go, as in tenancy

in common, to the surviving tenants and to the representatives of the deceased tenant.[2]

A partner can convey no title to his portion of the firm stock, free from the firm claim, although he may, in the course of business, sell any property belonging to the firm. Hence, it follows that his interest in the firm stock will not pass by judicial sale under execution issued at the instance of a separate creditor. A levy is necessary on an execution for each partner's interest, and a firm levy is requisite to cover the joint stock. The seizure, or possession, follows the title, and if a separate execution issues, it covers only the debtor partner's interest.[3] The seizure of both partners' interests on separate executions would not carry the firm title, but leave it unsold, and give to the purchaser of it an incumbered title.[4] The separate execution entitles the purchaser under it only to the debtor's interest after all the firm debts are paid. He acquires no immediate right to any portion of the joint stock, and although he becomes a tenant in common with the other partners, his right is not immediately available. He must first bring an account, in order to ascertain if there is any balance coming to his debtor after all the firm debts are paid, and thus ascertain the amount of his interest. If a separate creditor proceeded against the debtor partner's property, the law prevented him from taking it in execution, and made him sell only his debtor's interest on a dissolution of the firm. To ascertain what this ultimate interest, after the joint estate was ended, might be, the law directed an account.[5] It was only when the Common law machinery was found, upon experience, to be inade-

quate, that the account was transferred and became a remedy in equity.[6]

The effect of a legal lien is to prevent the alienation of the property free from the creditor's claim. If such a lien were accorded to the firm creditors, the firm stock would become immutable, and the business would become impossible. An equitable lien, on the other hand, adapts itself to fluctuating property. The creditor obtains a prior right to make his debt out of the joint stock, in its original shape, and through all its subsequent transformations. The original fund may disappear, but that by which it is replaced remains, subject to the creditor's claim. This equitable lien answers the requirements of the partnership. The partners may sell the stock and renew it by purchases, but the fund, at all times, remains liable to the claims of firm creditors.

But while the doctrine of equitable lien is, theoretically, sufficient for the protection of creditors, it does not explain, historically, the existence of their rights. These rights of firm creditors have been recognized at law from the beginning, whereas the equitable lien is exclusively a doctrine of Chancery. The courts of law secured the priority of firm creditors, not through an application of the doctrine of lien, either legal or equitable, but through the instrumentality of a joint estate. The joint estate became an additional debtor, independently responsible to firm creditors. The existence of the estate was a fact, and the firm creditors' privilege of recourse to the estate was not derived from any contract between the partners, but was an original right.

The Common lawyers were in the habit of considering the estate apart from the owner. In their minds, the property, in its physical aspect, often assumed a prominence superior to those abstract rights and obligations of the owner, which make up the true legal notion of his estate. As already stated, the cause of this mental bias was the Feudal method of dealing with land. The land was the permanent element in their social structure. The rights of the possessor, for the time being, never amounted to absolute ownership. Society curtailed his prerogatives for the benefit of his descendants. The estate was the continuing patrimony of successive generations. Land was visible and tangible, the rights of unborn generations were contingent and shadowy. Naturally, therefore, the mind of the Profession unconsciously gave to the land in its corporeal manifestation prominence over the abstract rights of uncertain and non-existent persons. A good illustration of this tendency is the effect of a judgment against co-debtors. After land was subjected to the claims of creditors, and it was admitted that these claims would survive against the land after the death of the debtor, the distinction between the owner and the land still remained, to mould a creditor's rights. Ordinarily, the obligation of the debtor is the primary thought, and the liability of his property exists only for the purpose of satisfying that obligation. If the obligation ceases, the property is freed from the creditor's claim. If one of two judgment debtors died, his personal obligation was extinguished, his personal property, therefore, was relieved from liability to the creditor, and the debt survived against his co-debtor

alone. But if the deceased debtor had been the owner of real estate, the judgment still remained a lien upon his land.[7] The reason for this difference was that, while the personal property did, the land did not, represent the personal obligation of the deceased debtor.[8] The land was itself an independent debtor. Further evidence confirming the proposition that the land, even when subjected to debts, did not represent the personal obligation of the debtor, is found in the following circumstance: A joint debtor was liable, in his individual capacity, for the full debt, and while the judgment was joint, the execution was always several, and might issue against his personal estate for the full amount due. Not so with the land. A joint debtor's land was liable only for his aliquot part of the debt, and the execution must issue against the lands of all the joint debtors simultaneously, in order that contribution might be more surely enforced.

The habits of thought, thus formed, paved the way by easy transition, to the notion of a firm fund as a separate and continuing debtor, independent of the original contract between the partners and of their subsequent acts, either in charging the fund itself, or in dealing with their title to it. The reason why this statement has the appearance of novelty at the present day, is because lawyers have outgrown the habits of thought, which characterized their predecessors. The lawyers of the present day exclude from their science the objects of the physical world, and confine themselves to the classification of abstract rights and duties.

The estate of the partners enabled them to trade in the capacity of joint tenants, and gave the debts

contracted for the joint estate a prior claim upon it. There was no lien, as in the case of a right against land, nor could there be a lien upon stock, which existed only for sale. A lien would frustrate the object for which the estate was created. Analogy makes the claim available according to the nature of the estate.

The partners are not entitled to the statutory exemption out of the firm assets. The exemption is a personal privilege, and not a firm claim.[9] The law makes no provision for a destitute partnership. If the law provided that the firm should have exemption for its members, the partners' right against the firm creditors would be as clear as against the separate creditors, but the exemption is not given to the firm; it remains the individual privilege of the debtor.

The title of a partner is recognized at law as coextensive with the firm estate. A policy of insurance given in his own name for firm property, covers both interests, unless he limits it to his own share.[10] He can maintain an action for firm property,[11] or intervene in proceedings which affect the firm title.[12]

The bankruptcy proceedings, as originally framed, recognized the joint estate. The joint and separate commissions kept the estates distinct, and made the separate claims subordinate to the firm creditors' rights.[13] The present administration upon a joint commission does not disclose the operation.

1. *Title of firm property remains with surviving partner.* B & Son, manufacturers. B died, April, 1882. C, surviving partner, knowing firm was insolvent, sold stock, fixtures and machinery to D, a creditor, in payment of firm debt. A *et al.* brought creditors' bill to set sale aside.—Dismissed. Legal title to assets survived to C, who is entitled to exclusive possession and control of them, and might sell all or any part of the property of the firm in payment of its debts. Russell v. Stroud, 12 W. N. 419, C. P. Phila. (1882); affirmed by S. C. of Pa.

2. The surviving partner is not an assignee of his deceased co-partner, and does not derive his title by devolution or assignment. He is an original owner by virtue of his joint title, which covers the entire firm property. Tremper v. Conklin, § 100, n. 5.

The death of a partner does not revoke the authority of an agent employed by the firm. The surviving partner succeeds to, or continues, the firm, and he alone can revoke the authority.

Authority of firm agent not revoked by death of a partner. B gave his note, without consideration, to C & D. They pledged it to A for a contemporaneous loan. C died, but before his suicide was discovered, F, a clerk, with authority to draw checks, drew out the firm deposits in A's hands. The firm was insolvent, and A sued B. Defence: Set-off of deposits withdrawn since C's death.—Recovered. A was a holder for value. E's authority did not end, because the right to withdraw balance and liquidate remained in D, and because E drew and A paid the checks in ignorance of C's death. D was the only one who could except to E's act, on the ground of a revocation of authority by C's death. Bank of N. Y. v. Vanderhorst, 32 N. Y. 553 (1865).

The joint tenant's release of his share does not bar execution for a claim, although the release operates as a merger of the share by relation to the feoffment which created the estate.

By release of share joint tenant shall not bar execution. A obtained judgment against B, joint tenant for life with C. B released his estate to C. A took the land in execution by elegit. C assigned to D, who surrendered to E, the reversioner.—Though release related back to original feoffment, and gave C title from that date, he took subject to B's life estate, which the law keeps alive for A's benefit. A grant by joint tenant would bind co-tenant who accepted a release, although grantor should die, for the release would prevent his taking by survivorship, and be subject to the grant. Likewise the reversioner, after the extinction of the tenancy by surrender, takes subject to the charge created during its continuance. The Lord Abergavenny's case, 6 Rep. 79 (1608).

3. The partner's right to sell was the ground urged for claiming that his separate creditor was entitled to attach firm stock. But the partner's power was to sell for the firm, and to make the assignment effective the attachment should be for a firm claim. Then, though but one partner should be served, the stock would be liable.

Attachment against one partner takes only his interest. A, in an action against C & D, issued an attachment against C. The firm failed, and thereafter judgment and execution against C, as a non-resident, and a sale of his interest to A. C & D assigned for creditors to B. This action brought to determine who had title to the property sold.—The firm assets being insufficient to pay its debts, C's interest was nothing, and A had no title. As the partner might have sold the firm goods, and paid the creditor, it was claimed that the

law might do so by attachment. But the attachment was not against specific property, or against the firm, but against the partner's interest. To render the analogy complete, the attachment should be against both; one should be served, and brought in, and execution issued against the firm property. If levied before the assignment, and sold, the law would have done what the partners could do. Staats v. Bristow, 73 N. Y. 264 (1878).

4. *Firm property cannot be conveyed, even by the consent of all the partners, in payment of their separate debts.* B, C, D, E & F, partners, owed A. E and F sold out to B, and he continued the business with C and D. B mortgaged his interest in the new firm to G, a separate creditor, who sold him out and bought in his interest. C mortgaged his interest to H, a separate creditor, who also foreclosed and bought in. D assigned his interest, without consideration, to I. A levied upon and sold the stock. No fraudulent intent was found against the partners.—Entitled to the proceeds. Assignment of firm assets for separate creditors invalid, though all the partners consent, unless the residue is sufficient to pay the firm creditors. They have no lien, but the firm title is joint, and the sale of a partner's interest passes no purpart, and does not destroy his equity. If the buyer got the stock and left the debts on the partners, his equity would be an iniquity. The sale to a partner is valid, unless the purchaser is insolvent, because he remains liable for firm debts, and the assets are not put out of the creditor's reach. B, C and D may dispose of the stock for the payment of their firm creditors, but E and F may object to an assignment for their separate creditors. Menagh v. Whitwell, 52 N. Y. 146 (1873).

5. By the English practice no sale of a partner's interest is made until an account has been taken, and then the interest, which is thus expressly subject to all the firm claims, passes to the buyer, who could never pretend that he bought any firm property. Place v. Sweetzer, § 100, note 6, *d*.

Partner's vendee no right to possession of partner's individual moiety, but limited to account. B & C ran a stage line, owning the horses and equipment. C sold out his undivided half to A, who sued for possession of it, or for its value. A obtained a verdict and judgment for $960.—Reversed. Sale dissolved partnership, and A not entitled to co-possession, but only to an account and the value of C's interest upon a settlement. B was entitled to retain possession for liquidation. Miller v. Brigham, 50 Cal. 615 (1875).

Attachment of firm property for separate debt a trespass. A & B, partners, sued C in tort for attaching firm property. C justified under a writ against B.—Judgment for plaintiffs. Seizure and removal of firm property on mesne process, like an execution, a trespass. Sanborn v. Royce, 132 Mass. 594 (1882).

6. The law recognized the partner's estate of joint tenancy, and when a separate creditor proceeded against the debtor partner's property, stopped him from taking it in execution. The law made him sell only the debtor's interest on a dissolution of the firm. To ascertain what this ultimate interest, after the joint estate was

ended, might be, the law directed an account. It was only because the Common law machinery was inadequate that the account became a remedy in equity.[a]

a. Article on "Executions by separate creditors against the joint effects of the partnership," by Mr. R. HUTCHINSON, 3 So. Law Rev. 250.

7. *Sci. fa. must join heir of co-judgment-debtor with surviving debtor, in order to enforce the debt against land.* A had judgment against B & C, and afterwards B died. A brought a *sci. fa.* against the survivor only. Defence: B left lands and an heir, who must be made a party. A demurred.—Judgment for A, for the judgment is against the person. Though by statute A may have *sci. fa.* and *elegit* to charge the land, he may elect to pursue the personalty. If A elect to charge the land, the charge must be equal, and *sci. fa.* must issue against C and the heir of B. After judgment on such a *sci. fa.* A may have *fi. fa.* against personalty of the survivor, or *elegit* against the lands of both. Smarte v. Edsun, 1 Lev. 30 (1661). See also note 4 to Tretheway v. Auckland, 2 Saunders 51. Sir Wm. Harbert's case, 3 Rep. 14.

8. *Death of one of two judgment-debtors throws the obligation wholly upon the survivor.* Judgment was obtained against B & C, who afterwards died. Then judgment was obtained, by default on *sci. fa.* to revive against A, the administratrix of B. A brought *audita querela*, averring that B had died in the lifetime of C.—Judgment for A, because the debt survived. Had any lands been bound by original judgment, the charge must have been borne equally by the real estate of each. Creditor must then have brought a *sci. fa.* against the heir and terretenants. Lampton v. Collingwood, 4 Mod. 315 (1695).

In Pennsylvania, land being assets for the payment of debts, the executor or administrator is substituted for the heir, and the lands of a deceased debtor may be sold on a judgment against him, without a *sci. fa.* to bring in the heirs as terretenants. Commonwealth v. Vanderslice, 8 S. & R. 452 (1822).

Sci. fa. against surviving, and personal representatives of deceased, judgment debtor. A sued B, C, D & E, and E, dying pending suit, obtained judgment against B, C & D. Subsequently, D died, and A issued *sci. fa.* against B, C and the executors of D. Defence: Misjoinder of action.—Judgment for A. ROGERS, J.: "The real estate is "bound by the judgment, and payment alone will discharge the lien. "Although I cannot perceive the propriety of the distinction, that the "judgment survives as to the personalty, but not the realty, yet there "is no question that it has been so adjudged in England and inci-"dentally in Pa. * If then the judgment be joint, and survives "against the land, the execution which follows the nature of the "judgment should be joint also; or, at any rate, against the same "persons, against whom judgment is rendered. The object of the "*scire facias* is to ascertain the sum due, and for the defendants to "show cause why the plaintiffs should not have execution against the "survivors, and the lands of the deceased; for in no other way can he "have the fruits of his judgment. If these principles be correct, and "they are supported by the highest authority, this defence cannot "avail the defendants." Com'wealth v. Mateer 16 S. & R. 416 (1827).

9. Are partners entitled to exemption out of firm property? If the exemption is allowed, the title of the

partners is several, and not joint, otherwise the separate claim for exemption would be subject to the paramount title.[a] The notion that as the partners could, but would not, divide the assets between them, the sheriff could make the partition, and set apart the exemptions out of the allotments, is based upon separate titles and a severance of the joint possession according to the titles.[b] Saying that the exemption cuts out joint, as well as separate, creditors, means, unless a tenancy in common exists, that the exemption is a joint, or firm, claim, and is preferred to the claims of firm creditors. But exemption has always been recognized as an individual, and not a firm, privilege.[c]

a. *Homestead on firm land not exempt from execution for partnership debts.* B & C, manufacturers of tiles, owned in partnership land on which mill was erected for the business. C also built and occupied a house on the firm land. A recovered judgment against firm and issued execution against the land. C claimed that his homestead was exempt. B opposed the exemption.—Judgment for A. Land treated as firm assets, and C's interest nothing, after firm debts are paid. Trowbridge v. Cross, 117 Ill., 109 (1886).

Partners no exemption out of firm property. A obtained judgment against B, C & D, and levied upon leasehold and machinery belonging to them as partners. B, C & D, who had no separate estates, claimed the statutory exemptions, but sheriff sold the property, and paid the proceeds into court. Court below awarded $500 to each, or one-third of the fund if less than $1,500.—Reversed. Partner has no separate title to firm property, and, if co-partners sever the joint title, the exemption attaches by virtue of the contract, and not of the statute. A's execution took the joint title out of the partners. Gaylord v. Imhoff, 26 Ohio St. 317 (1875).

b. *Partner entitled to exemption out of firm stock according to his share; which the sheriff may allot if the partners do not.* B, the sheriff, seized and took possession of firm stock. A claimed exemption, as a partner, out of it, and brought trover against B.—Recovered. Partner entitled to exemption out of his share of firm property, and if the partners do not aid the sheriff and divide the assets between themselves, he may make the apportionment. Skinner v. Shannon, 44 Mich. 86 (1880).

c. *No exemption out of firm stock.* B & C, partners in manufacture of cigars, assigned joint and separate estates for creditors. Assignee surrendered tobacco and tools, part of the firm stock, to C, who claimed the property as exempt. Substituted assignee sued for breach of assignment bond.—Recovered. Property claimed by C belonged to firm creditors. Prosser v. Hartley, 29 N. W. Rep'r 156 (1886).

Exemption for deceased partner's family out of his share, not out of firm property. B & C, partners in planting. C died, and D, a minor child, claimed $1,000 under Revised Civil Code of La., Article 3276, which secured that amount to D in preference to debts contracted by C.—Disallowed. Firm debts contracted by B & C. Partner's share subject to firm debts: Art. 2823. Succession of Pilcher, 1 S. Reg'r 929, La. (1887), note.

Conveyance by partner to co-partner not withdrawal to cut out lien creditors. B & C, partners in buying and selling real estate. D attached land of B & C. C then conveyed house and land to B. D obtained judgment, and, at sale, B claimed premises as protected. A bought at sale and brought ejectment against B.—Recovered. Lindley v. Davis, 13 P. Rep'r 118, Min. (1887).

10. *A partner's insurable interest extends beyond his share, and covers the firm stock.* A paid premium for insurance of firm stock, but took policy in his own name, on agent's assurance that interests of both A & B would be covered. Defence to A's suit for firm's loss: B's interest not insured, and A's quota but one-half.—Recovered for the whole loss. A's interest is co-extensive with firm stock. Manhattan Ins. Co. v. Webster, 9 Smith 227, Pa. (1868).

Interest covers joint title, unless limited to a single share. A, at Gaudaloupe, & B, at St. Kitts, made a joint shipment to New York. A insured the cargo for his account, though the policy covered any other person's interest, in part or in whole. The ship was captured, and A's portion condemned, but B's portion acquitted. Insurance $639.24; A's quota $366.60. A sued for his half. Defence: Policy covered B's quota, which was lost.—A recovered but a quarter. Lawrence v. Sebor, 2 Caines 505, N. Y. (1804).

11. *Non-joinder of a partner no bar to partner's recovery of insurance.* A & B insured a cargo, which they shipped on joint account with C. A & B averred, as plaintiffs, an entire interest in the insurance. Defence: C taken into the joint concern before insurance effected.—Recovered whole insurance. A & B's interest extended throughout the entire cargo. Page v. Frye, 2 B. & P. 240 (1800).

12. The title carries the right to intervene or recover for disturbance, and a partner may contest the seizure or attachment of firm property.

Partner's joint title enables him to contest creditor's lien on proceeds of a sale by the sheriff of firm goods. A ruled B, the sheriff, to pay over money raised by sale of C & Co.'s goods. B returned $900, proceeds and claims against them by D's execution and A's attachment. C appeared against the rule, and claimed an issue upon A's lien, because A had not sued or served the firm, or its members. A objected to C's intervention for the firm.—Objection overruled. C's title to firm stock authorizes him to represent the firm, to protect it. Wynne v. Millers, 61 Geo. 345 (1878).

13. A Digest of the Laws of Partnership, by BASIL MONTAGU, Esq., Chapter VII., 1 vol., pp. 183, *et. seq.*: 1822.

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§104.

The law rejected a tenancy in common of the firm property.

But the suggestion that the partners are tenants in common, persistently recurs at all points for discus-

sion, and again calls in question the settled principle of partnership at the Common law. The explanation is this: The relation is assumed, despite of history, to be defined by contract. The idea of a status, it is deemed, has been outgrown and superceded, although partnership was made a function of the Common law by means of the joint estate. The partners, it is now said, cannot by contract join titles, and prevent separate creditors from proceeding against the titles as distinct. In other words, partners cannot, by contract, withdraw any part of their property from execution. The rights of the partners, and of their joint and separate creditors, must be worked out upon the basis of a contract. The right of the separate creditor to his debtor's purpart in the firm property, is proclaimed to be equal to the firm creditor's claim against the debtor's separate estate, and this was formerly the basis of marshalling assets in Pennsylvania,[1] and is at present the foundation of the bankruptcy rule. The attempt is to reconstruct partnership upon a principle which did not organize the relation at Common law. It is needless to state that a system cannot be coherent while the fundamental principle upon which it rests remains unsettled.

A statute or constitution is sometimes deemed a mandate that the partner's title to firm property shall be construed several, and not joint, in order to give effect to the enactment. This construction is made when the exemption of a partner is granted out of firm assets,[2] or a statutory liability for the negligence of a partner in the firm business is made a lien upon a specific portion of the firm property as his separate estate.[3]

The purchaser of a partner's interest stepped into his shoes, and became entitled to joint possession with the other partners. If the sheriff delivered possession of the firm stock, a co-partner could not recover for the conversion of the firm property, but only for his half as a tenant in common. An attachment by a separate creditor is sustained upon the ground that the sheriff could seize the firm stock and sell a partner's interest, which would be treated as a moiety. This is according to the theory of a tenancy in common, or holding by several titles with joint possession, which would be severed by execution and the purchaser vested with defendant's title and possession.[4]

This practice is unsound. The sheriff can, it is true, seize the firm stock, in order to sell a partner's interest in it. The execution, a *fi. fa.*, required a tangible thing for it to operate upon.[5] But the requirement of the writ being satisfied, the sheriff must not disturb or remove the stock, and can sell only the partner's interest in it.[6] The purchaser acquires no right to immediate co-possession, but merely a claim to the balance, if any is coming to the partner, to be ascertained by an account. A distinction has been made in this respect between the interest of a general and of a special partner, and it has been said that a special partner's share can not be taken in execution. The sheriff could not seize anything in which the partner had an estate, as owner, absolute or qualified. The special partner's interest was declared to be a chose in action, or a claim, but not a property interest in the stock.[7] He had handed over the stock to the general partners, who have the exclusive right to its possession and control. But there is no reason for

the distinction. The special partner is a co-owner, although his property right is not separate and untrammeled. His interest is not, generically, different from that of a general partner. On this ground an attachment could not be laid upon the firm stock for a claim against a partner. The attachment would forbid to the firm the use of its stock, and amount to an exclusion until the controversy was ended. The purchaser of a partner's share does not become entitled to co-possession with the other partners, because the sale dissolves the partnership, and the purchaser is interested only in the liquidation which the partners are entitled to make, unless they are shown to be unfit.[8] If the sheriff levies on the firm stock, and sells a partner's interest on separate execution, the co-partner cannot recover in trover, because he would have no claim. Nothing passed but the partner's interest; which was liable to execution.[9] But if the sheriff delivered possession of the firm stock, then the co-partner could recover for the conversion of the firm property.[10]

1. Note by Judge J. T. MITCHELL to Northern Bank of Kentucky v. Keizer, 5 Am. Law Reg., N. S. 75 (1886).

2. *Constitution of Georgia provides a homestead for each partner out of partnership property*. B & C, partners. They took title, in the firm name, to a plantation, which they used in the firm business. They contracted a debt to A, part in 1871 and part in 1873, for which he brought suit, and obtained judgment, in 1875. In 1874 they made a partition of the plantation, which was all the property they owned in Georgia, as a firm or as individuals, and conveyed a moiety to each partner in severalty. Each had his moiety appraised and set apart to him as a homestead, under sections 2002–3 of the Constitution, which allows $2,000 in realty and $1,000 in personalty. A levied upon both homesteads as firm property.—Execution set aside. A partner is as much entitled to take firm property for a homestead from the firm creditors as his separate estate from his individual creditors. Harris v. Vischer, 57 Georgia, 229 (1876).

3. *Firm property severed by statute imposing liability for negligence of partner* Railroads B, C & D ran in partnership. A recovered judgment against B for negligence, and levied on locomotive and car,

property of the firm. C and D enjoined A from selling, on ground that B's interest less than debts, and joint creditors preferred to A.—Decree reversed. R. L. Vt., §3443, subject the rolling stock of railroads to execution, for injury by the corporation. B's quota assumed to be one-third, and that purpart liable. R. R. Co. v. Bixby, 55 Vt. 235 (1882).

4. *Sheriff may attach and hold firm stock for partner's quota.* A, B, C & D, partners. C withdrew, and D sold out to E. F, the sheriff, seized the goods under G's attachment against A, B, C & D, and under C's attachment against A, B & D. A, B & E sued F for the goods and damages for the detention. Plaintiffs obtained possession of the goods after action brought, and proceeded for damages.—Judgment for defendant. Execution against one partner authorizes sheriff to seize and hold all or part of the firm goods, to sell the partner's share in the goods seized, and deliver possession to the vendee, as tenant in common. An attachment simply anticipates the execution, and is governed by the same principle. Smith v. Orsee, 42 N. Y. 132 (1870).

5. *Fi. fa. seizes only tangible property, and does not pass book debts or good-will. Insanity of partner not a dissolution. Partner can't buy insane partner's interest at sheriff's sale, at least with firm funds.* Sheriff took in execution on judgments against A for £86, his interest in A & B, during A's temporary insanity, and sold it at auction to B, who paid for it by a check on the firm deposit, and charged payment to A's account. At time of sale assets were: outstanding claims £2,599 9*s.* 5*d.*; deposit in bank, £1,499 19*s.* 2*d.*; stock in trade, £963 17*s.* 4*d.*; cash, £15 and the good-will. B treated sale as dissolution, and carried on business as B & Co. A sued B as partner in spite of sale.—Decree. Purchase by B enured to A. Helmore v. Smith, 35 Ch. D. 436 (1885).

6. *Purchaser of partner's interest at sheriff's sale has no right to possession, and is only quasi tenant in common.* A bought a pair of mares, owned by B, C & D, of B, at private sale after execution had gone out against B. A also bought the mares at sheriff's sale, and brought replevin against E, a purchaser of the mares at a subsequent sheriff's sale of B's interest in the firm.—No title in A to maintain replevin, which requires right to exclusive possession. A no right to possession, which belongs to the partners, and is not even tenant in common. Rensheimer v. Hemingsway, 11 Casey 432, Pa. (1860).

7. *Special partner's interest cannot be sold on execution.* B, general, C, D & E, special partners. Articles provided that, unless C paid at maturity, certain private notes, and abstained from giving other paper without co-partners' consent, his interest in profits should cease, and his contribution be treated as a loan, at 7 per cent. F sued C on one of the notes, and attached his interest in the firm. Sheriff sold C's interest to D at public sale, C and D being present, but none of the stock in view. A, C's administrator, sued D, B & E for account and C's interest in the firm.—Judgment for defendants. Sale void. General partner exclusive right to possession. Therefore, sheriff could not levy on stock in order to sell special partner's interest, nor deliver possession. Choses in action not subject to sale on execution at Common law. Code provides for sale of stock in corporations; other debts must be collected by the sheriff, and applied to satisfaction of the judgment. A special partner's interest resembles a debt rather than stock in a corporation, and, after the breach of condition, C's interest became a debt by the articles. C not

estopped by his presence at the sale. Harris v. Murray, 28 N. Y. 574 (1864).

8. Miller v. Brigham, § 103, n. 5, and cases in § 101, n. 1.

9. *Sheriff who takes possession of firm stock and sells a partner's interest in it, does not convert the co-partner's share.* B, the owner of land, agreed to give C 3-4 of the crop for farming it. C formed a partnership with A, to farm the land with him, and they shared C's 3-4 equally between them. D obtained judgment against C, and E, the sheriff, took possession of the crop, and sold C's interest in it. A sued E for the value of 3-8 of the crop, and obtained judgment.—Reversed. The sheriff did not sell A's share, but only C's interest, which was all the purchaser took. Clark v. Cushing, 52 Cal. 617 (1878).

10. Farrell v. Colwell, § 100, n. 8.

Sheriff who sells joint property on separate execution, liable for damages in trespass. A & B sued C, sheriff, for trespass in selling firm property on execution against B.—Recovered judgment against C for damages. Bogue v. Steel, 1 Phil'a R. 90 (1850).

Sheriff who sells firm goods for the separate debt of one partner, is liable in trover only for the co-partner's moiety. A & B, partners. C, a separate creditor of B, issued execution against him, on which D, the sheriff, sold and delivered to E the firm goods. A sued D, in trover, for the value of one-half the goods sold. Defence: Non-joinder of B. If B not joined, the measure of damages, A's interest after a balance had been struck on a partnership account.—Recovered. A entitled to a moiety of the goods without reference to the partnership account. The partners hold the stock as tenants in common. The partner's equity to control his co-partner's share is not a title upon which he can recover. Walsh v. Adams, 3 Denio, 125, N. Y. (1846).

§105.

The theory of marshalling assets excludes the notion of a tenancy in common.

But the hypothesis of a tenancy in common to explain partnership, is answered by the facts, without any argument. The liability of firm stock for a separate debt, is not a principle of any court, and no distribution is made, *pro rata*, among all the creditors, but a discrimination is always made between the joint and the separate classes. The distinction of the law,

which classifies the creditors, is recognized as the basis of all the reasoning about marshalling assets. It is the admitted advantage at law, of the firm creditor, who can resort to both the joint and the separate estate, for the satisfaction of his debt, that has led to the interposition of Chancery. But even courts of equity have not deprived him of the privilege, or attempted to deny his right. They were satisfied, without giving to the individual creditor the exclusive right to the separate estate, to confine the joint creditor to the firm assets, when any existed, or, if he resorted to the separate estate, to make him deduct, for the individual creditor, a dividend equivalent to the dividend declared out of the joint estate.

The individual partners, being liable for the firm debts not less than for their individual debts, may be held by the joint creditors. The only restriction which can be put upon the exercise of their right, by a court of equity, is confining them to the joint fund in the first instance, so as not to deprive the separate creditors of their only fund. This is the extent of equitable interference. But the allowance of what the joint creditors had received from the firm assets implies that the separate creditors also share the joint assets with the firm creditors. They might not share it in the first instance, but the moment the separate estate is touched, they assert the right of participation in the joint funds by relation. They date back to the division of the firm assets, and make the division not only of them, but of the whole consolidated fund. Though the participation of the separate creditors in the partnership assets is contingent upon the joint creditors coming in upon the separate estate,

it is none the less a sharing, by the separate creditors, of the joint estate. This sharing, however, is based upon no independent right, or equity, but is a consequence of the control, by Chancery, of the exercise of a legal right, which it has no jurisdiction to take away. If Chancery should attempt to accomplish this result upon equitable principles, and stay the joint creditors with a joint fund from resorting to the separate estate, the only means of enforcing their abstention is by making them share the joint estate with the separate creditors.

As the effect of the condition imposed by equity upon the joint creditors, if they resorted to the separate estate, was to make them share the joint estate with the separate creditors, the right of the firm creditors, though not taken away, ceased to be an available privilege, except when the dividend of the separate estate exceeded the rate of the joint estate. The firm creditors have the right, at law, to come in upon the separate estate. They would share it equally, with the separate creditors. As the separate creditors never had any claim upon the joint assets, they could not ask any allowance out of that fund, and, of course, no account would be taken of what the joint creditors had received from the partnership estate. Both sets of creditors would start as equal claimants upon the separate fund, and be entitled to an equal distribution of it. Chancery, therefore, by the terms which it imposed upon the joint creditors, stripped their right of half its value. The other half was in danger of being lost by the lack of an accountant, who could credit to each partner's interest the proper proportion of the dividend obtained from the joint

stock, and carry it to the credit of the separate creditors upon the different separate estates before permitting the joint creditors to participate in the division of the separate estates. The intricacy of the problem, which must be solved, in order to equalize the quota which each creditor was entitled to receive out of the combined funds, led Chancery to adopt, on account of its simplicity, the 'rule of convenience,' which confines each class of creditors to its own estate in the first instance. The surplus of either estate, after its special creditors are paid, remains, as at law, the property of the creditors of the other estate, as each class has a cross-remainder in the surplus.

The joint creditor's right is not extinguished; it is subordinate to the right of the separate creditors, when both have estates for distribution. The allowance of proof by a firm creditor, against a separate estate, establishes a right, which may be controlled in its exercise, but cannot be denied as a prerogative.[2] The duty, which correlates with the right, exists as a liability, recognized and imposed by law. The exertion of the right is not interfered with, except when a joint fund exists.[3] Then, as the firm creditors have an estate which is exclusively appropriated by law to the satisfaction of their claims, the separate estate is reserved for the individual creditors. No excuse for limiting the firm creditors to their own fund exists until such a joint estate, which is available for them, is forthcoming. They are postponed for the convenience of distribution, but no embarrassment arises, unless two funds are to be shared, in common, by different sets of creditors. The liability of the separate fund for joint debts is never denied, as a legal

principle. On the contrary, it is asserted as indisputable.[4] If the several creditors had a primary right, or an equitable lien, no law could deprive them of recourse to the separate fund in the first instance. Any legislation which frustrated the resort, would interfere with a vested right, or would take away a security from the proprietor. The law would make compensation for such an appropriation. It would never be done by construction, or implication. If a statute should be held to deprive the separate creditors of such a recourse, it would show that no right existed, but simply a privilege, which the law gave for its own convenience of administration. Therefore, no legal right is violated when the joint creditors, in the absence of a joint fund, share the separate estate on an equal footing with the separate creditors.

1. The history of marshalling assets shows a contrariety of views in reference to the partner's title to firm property. At first, the firm creditors took the joint assets, and came in upon the separate assets with the separate creditors, though not until the separate creditors were allowed a rate equal to the partner's quota of the joint estate.

Upon distribution of joint and separate estates, separate creditors may deduct, by way of preference, from separate estate a rate equal to dividend received by firm creditors out of joint fund on account of separate partner's share. B & C owed debts as partners, and B was indebted to A on his separate account. B died, and his administrator *c. t. a.* had in his hands, for administration, some private property of B, and also some partnership property of B & C, but not enough to pay the partnership debts. The question submitted to the court was whether the separate property should be applied first to the payment of the debt due to A, or whether the firm creditors should come in *pro rata*.—Opinions were delivered *seriatim:* The majority: The Act of 19th April, 1794, gives creditors of the same nature an equal share in the intestate's estate. The creditor has a legal remedy against each partner for the whole debt. If B were alive, creditors of the firm might levy their whole debt on his separate estate. It is the partner's equity that neither has a right to withdraw anything from the joint stock and apply it to his private purposes until the debts are paid. The separate creditors are entitled to insist that the joint creditors, after having exhausted the joint stock, shall not take the separate estate until the separate creditors are made even, according to their

debtor's share, because, *e.g.*, one-half of the joint stock was received from the individual partner's estate. The balance is shared equally between the joint and separate creditors. The joint creditors gave credit to the firm, and the separate creditors to the individual partners. The joint creditors alone contribute to the joint mass, while both contribute to the separate estate. No credit is given to the partner which would create a lien; the partner might sell the next minute. The joint creditor's equity is not a lien; but firm stock is independent, and in addition to an equal right against the separate estate. The decision assumed the partners' shares to be equal, and the joint creditors, having received a dividend of twenty per cent. from the partnership fund, have therefore received ten per cent. from B's estate. A, the only separate creditor, was entitled, therefore, to ten per cent. before the joint creditors could share B's separate estate with him. GIBSON, J., dissented. Each fund should bear the burden of its own debts, and if the firm creditors can come on the separate estate, after the separate creditors have received an equal rate, the separate creditors should come in on the firm assets, when they are the largest. Bell v. Newman, 5 S. & R. 78 (1819).

2. Proof involves not only taking part in the election of an assignee, to distribute the fund, but also the extinguishment of the partner's debt by his discharge in bankruptcy. The right to prove is, therefore, an acknowledgement of the partner's liability to the full extent of his resources for the firm debt.

Under Bankrupt Act of 1800, § 6, a provision that "the discharge "should not affect any person liable as partner with the bankrupt," established the joint creditor's right to prove against the separate estate of a bankrupt partner. Tucker v. Oxley, 5 Cranch 34. The Act of 2 March, 1867, § 33, contains a provision to the same effect: "No discharge shall release discharge or affect any person liable for "the same debt with the bankrupt * as partner."

Joint creditor may prove against bankrupt partner's separate estate. B was adjudged a bankrupt. He had a partner, C. D, who was a creditor of B & C, proved his claim, and voted for E, as assignee. A, who was a separate creditor of B, proved his claim, and voted for F as assignee. As there was no election, the Register appointed E assignee. A excepted to D's proof, and demanded the appointment of F. Upon certificate to court—Proof sustained. The several liability exists as a constituent of a joint debt, and, therefore, proof allowed by a joint creditor against a separate partner, although no participation until separate creditors are satisfied. In re Webb, 16 Nat. Bk'pt Reg'r, 258 (1875).

Judgment-creditor of a firm, after exhausting its assets at law, may proceed against the separate estate in equity. B conveyed his real estate, through a trustee, to his wife, and she conveyed it to his father. A brought bill, as judgment-creditor of B & C, against B, his wife and father, to set aside conveyances and take land in execution as B's property. The defendants demurred, because, 1, C was not, and, 2, B's wife was joined, and, 3, firm assets had not been exhausted.—Overruled. No cause alleged or relief asked against B. Wife a party to fraud. A has a right at law, by virtue of his judgment, to seize B's separate estate, and equity enforces the legal right. He need not prove firm's insolvency, but sheriff's return of 'no goods,' shows that

he has exhausted the firm assets and his remedy at law. Randolph v. Daly, 1 C. E. Gr. 313, N. J. (1865).

3. Brock v. Bateman, § 102, n. 4.

If no joint fund for distribution, firm creditors share partner's separate estate with his individual creditors. B & Sons, bankrupts, left no more assets than were sufficient to pay the costs of proceedings. B had separate assets. A, assignee, claimed to come in with separate creditors of B.—Allowed. § 36 U. S. Bankrupt Act, 1867, does not alter the law. In re McEwen, 12 Nat. Bankruptcy Register 11 (1875).

B, who had bought out his co-partner, C, assigned for creditors. No firm assets, and C insolvent.—Firm creditors admitted to share B's separate estate with his individual creditors. Alexander v. Gorman, 7 A. Rep'r 243, R. I. (1886).

4. An attachment is allowed, even for a firm claim.

Attachment lies against a partner on a firm contract for his separate property. B issued attachment against A, who was a partner with C, in Georgia, but a citizen of ——. The declaration was against A alone, on a firm account. A moved for a non-suit, based on the non-joinder of C.—Refused. Code, § 3276, permits attachment against a partner, if limited to his separate property. Connon v. Dunlop, 64 Ga. 680 (1880).

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§106.

The partner's equity is designed for the protection of his separate estate, and becomes the foundation of firm creditors' rights.

The partner's equity originated in the self-interest of the man, as opposed to the partner. That motive induced him to force his co-partner to apply the firm funds to the firm debts. The stock was devoted to their payment, and could be used for no other purpose. Though this was the separate partner's work, done for his own individual benefit, the result was a distinct advantage to the firm creditors, who were to be paid out of the funds thus bound by the partner's equity to their claims. The destination enured to their benefit, and fixed the character of the partnership stock in correspondence with the nature of the partnership title. As the firm title was one and indivisible, so the

firm stock was devoted to a single and special purpose. The character thus stamped upon the firm stock, by the partners, became indelible. The partners themselves, though they all united, could not change the direction which they had given to the stock, to the creditor's detriment. An independent and paramount right has been created by the partner's equity, which dissolution itself would not disturb. This right created a new party, with whom the firm must settle before it could dispose of its goods. The creditors were not threatened until insolvency intervened, and, therefore, while the firm was solvent, the partners could dispose of the stock as they pleased. If Chancery should exercise control while the firm was solvent, it would take the management of all the partnership business of the country. But when insolvency occurred, the rights of creditors would be impaired by an alienation, unless for full value.[1] How, if all the parties unite in applying a portion of the firm stock to the payment of a separate partner's debt? This would be applying the firm assets to extinguish a separate partner's liability, but it would not relieve him. He would be liable to a firm creditor, who might have been paid with those assets, but was not. It is just the same to him, whether his liability is extinguished by payment of a joint, or by payment of a separate, creditor. If he could prefer a creditor, he might satisfy his preference by directing which creditor should be paid. But the law says: Adhere to the position you have taken, and to the estate which you have created, and be consistent with yourself. As the law denies to your partner a title which will enable him to convey any estate in the firm goods by means of sales not made in the

course of the firm's business, you shall not, while enjoying this protection, unite with him to accomplish a divertion of the firm stock from its original purpose, to the prejudice of your creditors. As persons hold themselves out as partners by their act, and by the legal effect of their contracts, so have the partners held out that the firm assets were irrevocably devoted to firm debts. Creditors, knowing the interest which led to the announcement, and relying upon the pledge, are protected. The partners might, as between themselves, rescind the contract, and appropriate the stock to their own individual use. But if they were honest, they would gain nothing by the divertion, and by paying separate, instead of joint, creditors; for the joint would then become separate. The law, however, says that they cannot revoke the pledge, without an equivalent. The offer was made for the partner's own benefit, but the pledge was accepted by the creditors, for their own sake. The bargain cannot be broken, except by the consent of both parties. The attempt to do so by the partners is a fraud upon the creditors, which a court of equity will enjoin.[2]

The partner's equity is his right to have the firm assets applied to the payment of the firm debts, in exoneration of his separate estate. This prerogative, though styled an equity, is, in fact, a legal right. It is a constituent of the partnership contract, and an element of the firm estate. It distinguishes a trade partnership from the brotherhood *omnium bonorum*. Without it, the contribution of a partner might, at any time, without his consent, be diverted from the joint purpose to the private relief of his co-partner, and his separate estate might, in this way, be drawn

in to supply a deficiency in the firm fund by the arbitrary act of his co-partner. The equity is a principle for the adjustment of the interests of the partners between themselves. This adjustment is made necessary by the individual liability, which the law imposes upon each partner, in spite of himself, and charges upon his separate estate, as the result of every firm obligation. Properly considered, the equity is not the source of the creditor's rights, but the means employed by the partners to restore among themselves the equipoise disturbed by the creditors in the pursuit of their legal rights.

Upon what does the partner's equity rest? Is it founded upon his interest in the partnership property? If so, a sale of his interest would carry with it the equity. The interest in the property would feed the equity, and when the source of supply was cut off, nothing would remain to sustain the offspring.[3]

When, therefore, a partner sold his interest in the firm, he would lose his right to require the application of the firm funds to their original purpose. He would be left with his separate estate at the mercy of the firm creditors, without any means of compelling his successor in the possession of the firm stock to discharge the old firm debts.[4]

Now, take the other, and the correct, view, that the interest is one thing, the equity another and a different thing. Then there is no necessary connection between the two rights. They may be severed and exerted, either together or apart. The two may be not only disparate, but antagonistic. The interest is a joint-property right. The equity springs from the ownership of separate property. The partners are

liable in their separate estates for the firm debts. The interest of the partners in the firm property protects itself. But the interest in their separate estates must be guarded by an equity, which entitles them to have the firm assets applied to the payment of the firm debts. The liability, which extends over the entire individual estates, must be restricted to its appropriate fund. The equity of the partner, therefore, springs out of his separate-estate liability. His separate estate might be exhausted in satisfying the firm creditors. He has, therefore, an independent right which gives him a motive to compel his co-partners to appropriate the partnership stock to the payment of the firm debts. Their payment, while an obligation of the firm, is a release of the separate estate. Every payment out of the firm assets exonerates, to that amount, the partner's separate estate. The object of the partner is not to have his separate estate charged with firm debts. If he sells his interest in the firm, his liability is not gone. He remains still a debtor for the firm debts to the joint creditors. His equity is now his only reliance. While a partner, his rights of control enabled him to protect his separate estate by appropriating the firm funds to the payment of firm debts. Now, that he has left the firm, his immediate right of intervention and control is gone, with his propriatary right as a partner. His right, as an individual and independent proprietor, would be put in jeopardy, unless his right to see that the firm assets were not misapplied, survived his connection with the firm.[5] At Common law, the exemption of a deceased partner's estate from liability dispensed with his equity. As he ceased to be liable for firm debts, he did not

need any equity to protect his estate. But when Chancery allowed recourse to his estate, the necessity for a corresponding equity, to protect it from being resorted to, while firm assets existed, was re-created, and was given to him. The executor was vested with the equity, on behalf of the estate.[6] This privilege was independent of the deceased partner's interest in the firm, for it continued in the executor after he had sold the interest to a third person.[7] The right, therefore, did not depend upon the interest which might have resulted to the estate had it remained part of the inheritance.

Consider for a moment the consequences of basing the rule that firm assets constitute a fund for the payment of firm debts, upon an interest, instead of upon a liability. The notion that the partner's equity is a personal privilege, which he may waive or assert at his caprice, enables him to cut out the firm creditors at any instant. The partners agreed to assume an individual debt, if execution were postponed. They were precluded, by the agreement, from setting up an equity to have the assets appropriated to firm creditors. The agreement barred the lien, or equity, of the partner. Though the stock remains liable to seizure, at the instance of firm creditors, until it is actually sold, yet the firm creditors may be cut out from access to it. The mere bargain, to dispose of the assets, will be sufficient to prevent their executions from taking effect. The parting with his equity by a partner, is more effective than the disposal by an owner. If the owner agreed to sell his property, but, before the sale was actually effected, an execution was levied upon the property, the sale could not take effect, except

subject to the execution.[8] The partners, though, as owners, they could not dispose of the stock by a direct bargain, and cut out a firm creditor, may effect the disposition, by an indirect bargain, and cut him out altogether. The process is simply for the partners to renounce their equity, and the effect of the renunciation is to convert the joint into separate assets. The agreement to assume the individual debt, if execution were postponed, is treated as a lien upon the partner's equity, and by means of it, is advanced over any lien of a firm creditor.[9]

The partners could, by a waiver of their equity, employ the firm funds in the furtherance of an individual purpose; they might, by original agreement, leave the entire firm stock in the hands of one partner, as his personal property. They would then have formed a partnership, and have sheltered the entire firm capital, on which they traded, from the prior claims of firm creditors. The whole idea of waiving the partner's equity is inconsistent with the theory of partnership. Men are often made parties by operation of law, without their consent, at the instance of their creditors. How much more, therefore, shall they be forbidden to renounce any rights which the creditors may enforce for their own benefit. It is the creditors who regulate the rights of the partners, and not the partners who regulate the rights of the creditors. The attempt to divert firm property and appropriate it to any other object, would be a fraud upon the creditors. The assertion of any individual right, until the firm creditors are paid, would be inconsistent with the partnership created by law. To make such a partnership dependent for its existence and its terms upon the caprice of

the partners, would destroy it altogether, as a creditor's partnership, and reduce it to a partnership between the partners.

The sale on a separate execution conveys only the partner's interest, which is subject to all claims against the firm. The aggregate interests of all the partners are also subject to the same firm liability, and a purchaser of each and all the partners' interests take a title encumbered with the firm debts. No specific property passes by the sale of the partner's interests, either separate or combined. Where, then, does the stock go? It remains the property of the firm, and can be got out of the partnership only by an act of disposition performed by the firm, or by legal proceedings on behalf of firm creditors. If the partners conveyed the firm property, it would pass, because they, as the proprietors, exerted the dominion vested in them. Whether the conveyance would be a fraud on their creditors is an independent matter. The conveyance of interests never could pass the stock. The partner's equity is the key to the situation, and his equity is held, in Pennsylvania, to pass with his interest. The last partner's conveyance, therefore, of his interest, carries with it the creditor's last hold upon the partnership stock. Judge GIBSON evidently considered the partner's equity as his separate estate. The assertion of it enured to the benefit of the firm creditors, but if the partner did not volunteer to exert his equity, it remained his individual right, and became extinct when his interest, which fed it, was gone. The liability of the partner, which still continues after a sale of his interest, for the firm debts, was overlooked as the foundation of his equity. The

interest which he had in the stock was regarded as the foundation for his right to exert a control over the disposition of the stock. The equity which springs from the separate liability, and guards the individual estate, was left out of account. When the interest was lost, no basis, it was thought, is left for a partner's intervention.[10] True enough, he is liable to firm creditors, and to individual creditors. But the twofold liability makes him neutral between the conflicting claimants. He has no right to do anything to favor one class of creditors over the other class. He must let the liabilities stand just as the law imposed them. It is equity, however, to exonerate the separate estate, by applying the firm assets to the payment of the joint debts. If the partner should satisfy the firm creditors out of the stock, they would, to that extent, be out of the way, and the separate creditors relieved of that amount of competition. No one would be harmed by keeping a resort to the firm fund, which would otherwise be lost. The sale of the interest would, it is true, yield more by reason of its passing the partner's equity, but this would be using the equity, not as a protection for firm creditors, but as a sword, to slay them. The equity could not be used to effect a dispossession of the firm creditors. The proceeds of a sale of the partner's interest are separate estate, and his equity is treated as if indissolubly connected with his interest, and sold with it. The equity, on the contrary, is independent of the partner's interest, and does not pass by a sale of it. The equity still exists, to protect the separate estate, and enures to the benefit of the joint creditors, who are entitled to avail themselves of it. The stock is

subject to a lien, which belongs to the firm creditors. The conveyance of their interests by the partners would not effect the stock, nor its incumbrances."

1. How does the theory of joint tenancy affect the alienation by a partner? The disposition is subject to debts, unless in the course of trade, and in all other cases, enables the joint creditors to enforce an equitable lien.

If a partner sells his interest in the firm, nothing passes by the sale but the seller's share, after the estate and its liabilities have been settled.[a] If the partner sells out to his co-partner, the share passes, subject to the firm debts. The joint creditors should treat the conveyance as a fraud, if intended to sever the joint title and convert the firm property into separate estate.[b]

a. *Partner's interest in execution only balance after payment of firm debts.* B & C, brickmakers, sold out to A, for $2,500, and let him brick-yard for one year, at $100 rent. Reciting sale and lease, it was agreed the same day that A should carry on business in his name, advance $2,000, and furnish everything necessary; that he should employ B, at $2.25, and C, at $2.00 a day; that A should receive $2,000 a year, and lawful interest on his advances, and that he should reconvey everything when B & C repaid him above sums and an old mortgage. D, an individual creditor of B, levied on the chattels, and A enjoined sale.—Maintained. If B a partner, firm debts double amount of assets, and take precedence. Atwood v. Impson, 5 C. E. Gr. 151, N. J. (1869).

b. *Partner's appropriation, while insolvent, of firm assets to payment of separate creditors a fraud on firm creditors.* B & C partners. In 1874, D took B's notes for loan of $2,000; in 1875, C's note for loan of $4,700. 7th January, 1881, B & C indebted to D & E, $14,000, and to A *et al.*, $13,000, conveyed firm R. E. to D, in part payment of said notes, and assigned other assets, first to pay D & E in full, and then A *et al. pro rata.* A *et al.* obtained judgment, and on return of *nulla bona*, brought bill to avoid conveyance, as a fraud on them.—Decree. Assignment equivalent to bankruptcy, and conveyance, while insolvent, a gift to separate creditor. Though firm creditors no lien on firm assets, entitled to set aside conveyance for fraud. Goodbar v. Cary, 16 Fed. Rep. 316 (1882).

Menagh v. Whitwell, § 103, n. 4.

If the partner sells out to his co-partner, who agrees to pay the firm debts, the seller can compel him to apply the assets to such payment. The sale devested the partner's property interest, but was made subject to the firm debts, so that the partner would continue interested in the payment of them, in relief of his liability and for the benefit of firm creditors.

The confusion has arisen from a joint sale by both partners. Although each sells subject to the joint title,

which is paramount to the several titles, the sale by both leaves no representative of the estate, and unless it is insolvent, no court has jurisdiction to take charge of the *hereditas jacens*. There is, however, no lack of a title-bearer. Either partner may enforce the joint title after a sale of both partners' interests, in order to protect his separate estate, and the firm creditors may avail themselves of his right.[c] They cannot be deprived of this privilege by the partner's renunciation, because they are entitled to make him exert his joint right for their satisfaction. The conversion of the joint into separate estate, and the abandonment of the title, is a fraud upon them. It hinders and delays them, by confounding them with separate creditors, even if the separate partners are solvent.[d]

c. *Sale on separate executions against each partner, passes no title against joint creditors.* B & C sold the joint stock, and applied it to the payment of the separate debts of each partner. A subsequently obtained judgment against the firm, and levied on the stock.—Execution valid. A's claim paramount to claims of separate creditors. Ferson v. Monroe, 1 Foster, 462 N. H. (1850).

d. The conveyance by a partner of his share in the joint stock to his co-partner, if he or his co-partner is insolvent, is a fraud on the firm creditors. The transfer being voluntary, is a constructive fraud upon them, and will be set aside without proof of actual fraud.

Partner's assignment to co-partner unable to pay firm debts voluntary and not binding on creditors. B & C, partners. B contributed $4,000, C $2,000 borrowed money. Business began, 1 Febuary, 1881. Firm dissolved, 27 September, 1882. C paid B $4,000, and agreed to pay creditors. He commenced business, and asked an extension by the creditors, admitting his inability to pay. A *et al.* brought creditors' bill to set sale aside.—Sale voluntary and not binding on firm creditors, who are entitled to the assets. Proof of actual fraud negatived. Johnston v. Straus, 26 Fed. Rep. 57 (1882).

2. If the partners assign the stock, why cannot firm creditors follow the assets, and claim payment? The joint creditors have no lien on them, and the price stands for the stock, if an equivalent. If not, and sufficient property is not left, equity would give the creditors recourse to the fund.[a] The renunciation by the partner of his equity would not effect his creditors, who are not bound by his dispositions in fraud of them.[b]

What is the construction of the assignment, if accompanied by an agreement of the assignee to pay the debts? The assignment is made subject to the debts. The agreement goes with the assets, and the liability

becomes the assignee's own debt, and not a personal contract with the assignor.[c]

a. *No transfer by partners will release the fund from joint debts, unless the firm was solvent, or an equivalent was received for the assignment, made in good faith, and with the intention to discharge the assets of original liability.* A firm composed of four. One retired, and the three continued the business with the assets equal to their liabilities, excepting the large debt due the retiring partner. He reentered the firm for a year, stipulating for repayment of his debt, and the balance, after payment of other debts, to be divided among his co-partners. This was, in effect, paying a partner with firm assets when the firm could not pay its creditors.—He was held liable for the amount withdrawn from the firm assets. CADWALADER, J.: "The argument on this point assumes that these creditors cannot "complain of injury suffered from any disposition of the joint prop-"erty in which all the partners united, if there was a sufficient con-"sideration for it, as between the immediate parties to it. The as-"sumption is unwarranted, and, as may be even said, fallacious. The "existence of a consideration sufficient, as between the parties, does "not suffice to sustain an act against creditors whose rights it was "intended to defeat or frustrate, or, what is the same thing, had a "tendency to defeat or to frustrate. So the law was held in Twyne's "case (3 Co., 80), and in earlier and later decisions. In this respect "the enactments of the statute 13 Eliz., chapter 5, are declaratory of "the Common law. The rule of decision is a general one. Its "direct application to acts changing the ownership of partnership "property, so as to frustrate the recourse of the joint creditors of the "firm to it, is exemplified in many decided cases which have been "cited, and in more than one of them, was expressly so stated and "explained. To except such acts from the general rule would afford "an immunity for profligate transfers of joint property in derogation "of rights of creditors." Potter v. Magee, Pamphlet U. S. C. C. (1878).

CADWALADER, J., thus states a leading authority: "The cited case "was that of a retiring partner whose interest in the joint concern was "computed upon the estimate of bad and doubtful debts at par. He "had withdrawn part of his so-called capital before the dissolution "effected by his retirement; and the rest was afterwards paid to him, "from time to time, as a debt, by the continuing partners, during four "years, at the end of which they became bankrupt, with a deficit ap-"proximately equal to the whole of what he had, before and after the "dissolution, received under the name of his capital, or of their debt "to him. He was, at the suit of the assignee in bankruptcy of the "continuing partners, compelled to refund to their estate so much as "he had received from them since the dissolution. A decree for an "account of what he had previously received, beyond his just share, "was refused, because any such excess was not recoverable by the "complainant for creditors of the bankrupt partners, though it might "have been recoverable by creditors of the former firm, if any such "creditors had been unpaid. Anderson v. Maltby, 4 Brown, Ch. 422; "s. c., 2 Ves. Jr. 244."

b. *An assignee in bankruptcy of a partner could not reclaim a payment made by his co-partners, in fraud of creditors, though the firm assignee could.* A firm, C & D, having numerous creditors, of whom A was one, became embarrassed, and stopped payment. From that time, with the tacit assent of D, C, who had put in two-thirds of the capital, and was a large creditor of the partnership for money lent,

proceeded as if the partnership had been dissolved, managed the assets as if they had been his own, continued business in his own individual name, and proposed to creditors a compromise. To further this, he paid A a large sum in anticipation of A's share. The necessary number of creditors not consenting, he made a general assignment of *his* property for the benefit of his creditors to State assignee. Then, on petition of firm creditors, who had got wind of the secret agreement between A & C, C, not the firm, nor D, was decreed a bankrupt, and B appointed his assignee. On appeal, A contended that B could not recover the sum C had paid A, denying fraud, and setting up the point that B was assignee of C, individually, and not of the firm of C & D; that the co-partnership had not been dissolved; that B did not represent the interest of D, and that D's interest did not pass to B.—Firm not dissolved; only assignee of partnership could recover here; B is merely assignee of individual partner. Amsinck v. Bean, 22 Wallace 395 (1874).

c. *If partner takes firm stock, and agrees with co-partner to pay firm debts, agreement enures to firm creditors.* B assigned the firm assets to his partner C, who agreed to pay the firm debts. The firm subsequently became bankrupt. Firm creditor A proved against C's separate estate.—Allowed. The agreement was in addition to partnership liability, and enured to the firm creditors. In re Long, 9 Nat. Bank'cy Reg'r 227 (1874).

3. It is only the gravity of the situation, which prevents one from considering the transaction a joke.

Firm creditors barred by partners' distribution of assets among themselves. B, C, D & E, traded as B, C & Co. B bought out C, and gave D & E $4,000 in secured notes for their quotas, and, in consideration for the assets, then adequate, undertook to pay the firm debts. B squandered the assets, and D and E, who became insolvent, assigned the notes to F, for separate creditors. A, who was surety for B, C & Co., brought bill for application of money collected on the notes to payment of firm liabilities.—Dismissed. $4,000 in notes for price, individual property of D & E, as $4,000 of assets, if distributed to them, would have been; and conversion by partners of joint into separate estate, bars their equity and creditors' right, which depends upon it. Belknap v. Abbott, 11 Ohio St. 411 (1882).

Firm assets, $8,000 divided bet.	B, $2,000 C, 2,000 D, 2,000 E, 2,000	and nothing left to firm.

Firm debts, $8,000, unpaid, and separate debts $8,000, could be paid with firm funds.

4. The equity, on the contrary, springs into existence under the pressure of the partner's liability. This appears clearly in the case of a partner by estoppel. He has no property interest, and, therefore, no right to exert, as proprietor, any control over the firm assets, yet the holding out creates liability as a partner, and gives the party held out the partner's equity for relief from the liability imposed upon him by law.[a]

a. Bitter v. Rathman, § 69, n. 19.

The equity is equally available for the creditors of the partner by estoppel.[b]

b. Buffalo City Bank v. Howard, § 69, n. 19.

5. The sale of a partner's share was held to bar his equity. His right to have the assets applied to the firm debts passed as an incident to the property assigned, as if a privilege of the debtor alone, in which the beneficiaries had no concern. But, in the language of Judge SHARSWOOD, "the equity of a partner is solely "grounded on his liability for the debts, which con-"tinue after his interest is devested, and is not trans-"ferred to his vendee. As the liability of the partners "to answer personally for all the debts of the firm is "not extinguished by a sale or devesture of his interest, "so neither is his equity, which depends upon it."[a] The titles of the partners were regarded as several, and an owner may dispose of his own without let or hindrance. But, unless a full equivalent is paid, the stock is given away, and by being subjected to the purchaser's separate debts, is taken from the firm creditors. If he agrees to pay the joint debts, they should be a lien, which, being founded upon the seller's liability, and in ease of it, should entitle the creditors to insist upon the application of the stock to the firm debts. This should be implied without an indemnity.[b] The joint creditor, it is sometimes said, has no lien, even in equity, to prevent the alienation until he obtains judgment, nor upon personalty, until execution.[c] This is a technical view. The joint creditors are entitled to the fund by the exclusion of the separate creditors and by the partner's equity, which appropriates the assets to the firm creditors.[d]

a. Brenton v. Thompson, § 103, n. 2, *a.*

b. *Joint assets charged with firm debts until they are satisfied.* A claimed exemption. The only evidence of separate ownership was his attorney's testimony that firm of A & Co. had dissolved and divided the stock. Firm creditors attached the property. State *ex rel.* A issued mandamus against B, the constable, to set apart the property claimed to be exempt.—Dismissed. Assets remain charged with firm debts. Till's case, 2 Neb. 261 (1874).

c. *Separate judgment creditor takes balance raised by joint execution, and joint creditor, without judgment, no standing to prevent it.* B & C gave a chattel mortgage on their stock, as partners, to D. A brought suit, as a firm creditor. B confessed judgment to E, an individual creditor, who levied on the firm stock. D foreclosed, and after his debt was paid out of the proceeds of a sale, $670 remained in the sheriff's hands for distribution. A enjoined sheriff from paying

E.—Injunction dissolved. A had no standing, until he obtained judgment, even to prevent firm from conveying in fraud of creditors; no quasi-lien on firm property against either partners or individual creditor. Mittnight v. Smith, 2 C. E. G. 259, N. J. (1865).

NOTE.—How could specific property pass by execution against a partner's interest. The $670 represented the interests of both partners. Half, or $335, would not be separate estate, because account necessary of all items, in order to strike an ultimate balance.

General firm creditor no standing to prevent execution by individual judgment-creditors upon firm assets. Individual creditors obtained judgments, and took the firm assets of B & C in execution. A claimed, as a joint creditor, distribution among the firm creditors, and demanded an injunction.—Refused. No standing, without an execution, which bound the assets at law. Young v. Frier, 1 Stock, 465, N. J. (1853), overruling Blackwell v. Rankin, 3 Hal. Ch. 152.

Firm creditor without judgment no lien on stock. B gave use of his saw-mill to firm of B & C, for ten years. The mill and improvements, erected with funds furnished the firm by A, constituted its sole capital. At end of four years, B assigned for his separate creditors. Assignee sold premises to D, but B remained in possession. A, without judgment, demanded a receiver, and application of proceeds of unexpired term to firm debts.—A no standing to prevent disposition made by B with C's consent. Greenwood v. Brodhead, 6 Barb. 593, N. Y. (1850).

d. CADWALADER, J: "Where joint creditors have a beneficial recourse "to joint assets, it matters little, to practical intents, whether they "have such recourse through a distinct right of their own, or derive "the right through an equity of a partner or partners, or acquire it as "a consequence of the necessary exclusion of the separate creditors. "The rule of distribution is practically the same in whatever form of "words the proposition may be stated." Potter v. Magee, Pamphlet, p. 21, U. S. C. C. (1878).

The notion that the partner had relinquished his equity, and that it passed with the conveyance, which bound him, led to the conclusion that he retained no right which his creditors could enforce. They must, therefore, make out a cause of action independently of their debtor. The outstanding liability, however, is the ground of his equity, and until the debts are satisfied he is entitled to exert his control over them for the purpose of liquidation. The joint creditors are subrogated to his rights, and may enforce them.[e]

e. General creditor of insolvent firm may enjoin separate execution creditor from seizing firm assets. B & C confessed judgments to their firm creditors, and each partner also confessed judgments to his separate creditors. Executions were issued on the separate judgments, and the sheriff levied on the firm stock. A, who, though without a judgment, was a firm creditor, averred insolvency of the firm, and enjoined the sheriff.—Injunction maintained. A joint creditor, though without judgment or execution, has an equitable lien, which entitles him to prevent separate execution creditors from seizing firm property. They can take only the interest of the separate partners, and the firm being insolvent, they have nothing. Blackwell v. Rankin, 3 Hal. Ch. 152, N. J. (1848).

If the business is continued, the right is also continued, except so far as it interferes with the rights of creditors of the new firm.[f]

f. Lien of deceased partner's representatives limited to old firm stock, if they consent to continuance by surviving partners. B & C, manufacturers. B died, and his widow, D, became administratrix. C died, and his widow, E, appointed administratrix. Children of B & C continued business, with administratrix' consent, for eight years, when firm became a corporation. Upon its assignment for creditors, D and E claimed a lien in preference to creditors.—Disallowed. Lien restricted to old stock, and continuing partners, in favor of creditors of new firm. Hoyt v. Sprague, 103 U. S. 613 (1880). The lien enures to the creditors of original firm. "Lord ELDON said: 'In the case of "death, it is the equity of the deceased partner that enables the cred"itors to bring forward the distribution.' 11 Ves. 6. If the surviving "partners form a new partnership with other persons, the joint credit"ors of the old firm can follow the assets of that firm, in order to make "such assets (including the deceased partner's interest) liable for the "debts of the old firm, so far as this can be done without a disturbance "of *bona fide* rights of creditors of the new partnership, and of other "persons. Lord ROSSLYN said that the complainants in a bill for this "purpose, 'are creditors upon the effects of the old partnership, not "upon the effects of the new partnership.' Daniel v. Cross, 3 Ves. "277;" CADWALADER, J., in Potter v. Magee, p. 22, *supra*.

6. *Deceased partner's equity, enforced by the joint creditors, is limited to applying assets to payment of firm debts, and not extended to prevent preferences among firm creditors.* B, C & D, partners. B died, December, 1828, and E appointed administrator. Firm continued business until January, 1829, when it became insolvent. D, without consulting C or E, assigned for preferred creditors, to F. A *et al.*, firm creditors, brought bill to avoid assignment.—Dismissed. Surviving partner may prefer, "but deceased partner's representative," said WALWORTH, Chancellor, "has the right to insist that the part"nership effects shall be applied to the payment of the debts of the "firm, as the separate estate of decedent may eventually be made "liable for any deficiency." Egberts v. Wood, 3 Paige Ch. 517, N. Y. (1832).

7. *Equity not a property right which passes with the stock.* A sold out to B, who took the joint stock to pay the firm debts and indemnify A against them. B became insolvent, and threatened to appropriate assets to his own use. A brought injunction. B demurred.—Demurrer overruled and decree. WALWORTH, Ch.: "It is a well"settled principle of equity that the creditors of a partnership concern "have an equitable right to payment out of the partnership effects in "preference to the individual partners." Deveau v. Fowler, 2 Paige Ch. 400, N. Y. (1831).

The deceased partner's estate is liable in the first instance,[a] and the equity springs from the liability.

In Pennsylvania the liability extends to a debt due by the deceased partner to his co-partner.[b]

a. Brewster v. Sterrett, § 88, n. 2.

Deceased partner's estate liable for firm debts. B & C partners, dealt in real estate. C left all his property to D, his executor. After

executions and attachments had issued against the firm estate, B assigned it for creditors to A, who brought bill to enjoin creditors, and to compel D to convey him the legal title.—Decree. Shanks v. Klein, 14 Otto 18 (1881).

b. Firm creditors may collect balance due by deceased partner to copartner. The assignee for creditors of the surviving partner claimed on behalf of the joint creditors against the administrators of the deceased partner for the amount he owed the firm, $16,790.13. The surviving partner was also indebted to the firm, $11,204.68. Both were insolvent, as well as the firm.—The debt of the partner to the firm, is a firm asset, for which he must account to his co-partner, who would first deduct his own debt to the firm, and claim one-half, $2,792.72½. The balance of $5,585.45, is due to him on account of his share of the firm assets. McCormick's Appeal, 5 Sm. 252, Pa. (1866).

8. *Joint execution any time before sale, cuts out separate executions.* Separate executions were issued against both A and B, and subsequently an execution against the *firm* A & B was lodged with the sheriff, who, in doubt how to sell, took an agreement from counsel that the sales should be lumped, and the proceeds divided as if the sales had been made according to law.—Joint execution bound each partner's equity, and a sale or transfer could not release the lien. Change of title must be before lien attached. Sheriff was bound to make lien effective by a sale, first, on the joint execution. That is a lien on the chattels; the separate executions, on the surplus after payment of firm debts. Coover's Appeal, 5 Casey 9 (1857).

What gives the court authority to make distribution upon joint and separate executions? Inconsistent returns by the sheriff, who says he made the money on both writs. The court has to ascertain how he might have sold under the writs put in his hands, and then presumes that he did his duty, or what the law prescribes as the course for realizing under the different classes of writs.[a]

a. If sale on joint and separate executions, proceeds go first to firm creditors. A issued execution against C, and E issued execution against C & D. Subsequently B issued joint execution. Sheriff returned that he had sold property of C & D on all the writs. A claimed payment, in preference to B, out of proceeds.—Judgment for B. A no interest until firm creditors paid. King's Appeal, 9 Barr 124, Pa. (1848).

How did the courts arrive at the conclusion that the separate executions made any part of the fund? The joint executions would be first in order, no matter when they reached the sheriff's hands, for until a sale the title would be subject to seizure, and the firm execution would take the specific property. Instead of saying, however, that the whole fund was raised by the paramount writ, and leaving the money in the sheriff's hands for other firm creditors, the court said, that as the sheriff returned

a sale on all the writs, the balance, after satisfying the joint executions, was raised by the separate executions.[b]

b. *Sale on joint and separate writs entitles separate creditor to surplus after payment of joint execution.* B issued joint execution against C & B, for $200. E issued separate execution against C for $233. Constable levied on firm stock under both writs, and sold for $400. Before sale, D notified constable not to pay over to E any surplus which should be left after payment of B's claim, because the firm had assigned surplus to joint creditor A. Constable paid surplus to C, and A sued constable.—Judgment for defendant. Roop v. Rogers, 5 Watts 193, Pa. (1836).

If a separate creditor levied on the firm stock, which was insufficient to pay the joint debts, could he be enjoined from selling? He would be enjoined if nothing would remain over and above the debts, the separate creditors would get nothing by the sale.[c]

c. *Firm creditors enforce partner's equity, and confine separate creditors to balance left after firm debts are paid.* B, C & D, traded as B & Co. E and others, separate creditors, attached the firm stock for an aggregate indebtedness of $2,452.23. A, who had subsequently attached the stock, brought a bill to enjoin sheriff and for payment of a firm debt for $1,328.77.—Decree. "It follows," said REDFIELD, J., "from the admitted fact that a partner's interest is only his share of "the surplus after all partnership debts are satisfied, that while a part-"nership creditor may sell the entire interest in all the tangible prop-"erty of the firm, the creditors of the separate partner can sell only "the interest of that partner, which may be something, or nothing, as "the concern shall prove solvent, or insolvent, on a final settlement "of all its concerns. So that in this way the entire property of the "partnership might be sold upon execution against each separate "partner, and still nothing accrue to any of the purchasers, since all "must purchase subject to the claims of all the joint claims. This, "then, being the rule, it is useless to attempt to exclude the prefer-"ence of joint creditors, since every sale, upon a separate execution, "*must be made* subject to their claims, * no rule of English juris-"prudence is better settled."

"Unless, then, we are prepared to put the law of the State upon a "different basis from the law of any other State, almost, upon this "subject, we must recognize the right of these partnership creditors "to be first paid. It is true, that they prevail here over the separate "creditors by virtue of a lien, which each partner is supposed to "have, by implied contract upon all the partnership effects, until all "the partnership debts are paid. This gives him an equity prior to "that of the separate creditors; and it is only by calling this equity "to their aid, that the partnership creditors are enabled to maintain "their claims in this case. But this is not a new principle in equity, "for one man to prevail in a suit, not by his own superior equity, "but in consequence of that which resides primarily in some "third party, who is, indeed, generally a necessary party to the bill. "This is the case where a creditor claims to have the benefit of se-"curities put in the hands of his debtor by some other debtor, the "two debtors standing, perhaps, in the same relation to the creditor, "but one being principal and the other surety as between them-"selves. So, too, in all cases where one holds funds, which are ulti-

"mately to go in a particular channel, equity will interfere on behalf "of the party ultimately to be benefitted by such appropriation, not- "withstanding he may not be a party to the original transaction. "This is always more or less the case, when a court of equity inter- "feres in marshalling assets."

"It is upon this very principle of the law of partnership, that each "partner is bound for the *whole debt* of the partnership, and so, as "to the share of the other partners, is virtually a surety, that a court "of equity will suffer one partner to maintain a lien upon the co- "partnership property, until he is released from such suretyship, "when all the debts of the firm are paid. Nor is there anything "singular in enabling partnership creditors to enforce this lien, "which is thus created upon the partnership funds in favor of the "creditors of the partnership, although not created principally for "their benefit, but for the security of the other partners. This is "but carrying out the most familiar principles of the law of principal "and surety, as well between themselves, as between each and their "common creditor. Authorities might be multiplied upon this "point both in England and this country." Washburn v. Bank of Bellow's Falls, 19 Vt. 278 (1847).

The principle alluded to by Judge REDFIELD is called the doctrine of *ex parte* Waring: "The Rule ex Parte Waring," by ARTHUR CLEMENT EDDIS, B. A., Barrister at Law: 1876.

The Court, in other instances, has assumed the task of distributing a fund among all the creditors entitled, although by virtue of no writ, except the one under which the sale was made.[d] In the absence of an insolvent court on adverse process, a distribution should be made by the Common Pleas. The balance could be retained for other firm creditors, who are entitled to the proceeds, and not handed over to separate creditors, who are entitled to nothing until the joint creditors are paid in full.

d. *Court marshals assets not only among execution creditors, but among all creditors.* B, who had a simple contract claim against C, deceased, obtained judgment against his administrator D, and entering it *de terris*, sold lands which belonged to C's estate. A had a specialty claim, for which he demanded payment to the exclusion of B.—Decree for A. Administrator guilty of devastavit, if he permits execution to be levied out of personal property, to the prejudice of preferred claimants. But he could not prevent the judgment creditors from taking the land. The courts, however, will not permit the proceeds to be distributed until notice has been given, in order to enable those who have preferred claims to come in and be paid. The Agricultural & Mfrs. Bank v. Stambaugh, 13 S. & R. 299, Pa. (1825).

Penalty of official bond distributed pro rata among creditors without reference to date of execution. B, administrator, gave official bond, for $20,000, to Commonwealth. A recovered judgment for penal sum, and his claim was liquidated at $7,162.75. The claims against administrator exceeded $20,000.—A entitled only to *pro rata*, and court controlled executions. Wetherill v. Commonwealth, 17 W. N. 104, Pa. (1885).

If the sheriff makes a return that he has made the money on a particular writ, can the court marshal the fund among other execution creditors? The return cannot be contradicted. A levy on a partner's interest was cut out by a firm execution, although there was no firm, and the defendant in the execution owned the property.[e]

e. *Sheriff's return of property sold on a particular writ conclusive.* A, an individual judgment creditor of B, issued *fi. fa.* against him, and to this writ the sheriff returned that "he had levied all the interest of B in the business and property of B & Sons, and subsequently sold said property as that of B & Sons under execution against the firm." The fund arising from the sale under execution against the partnership, was referred to an auditor for distribution. Before him, A claimed the amount of his judgment out of the proceeds, and offered evidence to show that no partnership existed, but that the property belonged to B alone.—The auditor could not inquire into the existence of the partnership, and A was concluded by the return to his writ, and estopped from making any claim to the fund. Bogue's Appeal, 2 Norris 101, Pa. (1876).

How is the fund marshalled between separate executions when the sale is lumped? According to the shares of the respective partners defendant. If one is creditor of his co-partners, the separate creditor of the creditor partner will take the fund.[f]

f. *Separate executions satisfied according to respective partner's share.* B invested in the partnership of B & C, over $17,000 more than C. On the same day separate executions were issued by A against C, and by D against B; but before sale, E issued execution against the firm. Appeal from auditor's distribution of proceeds.—E should be paid first, and then D to exclusion of A, because B's advance in excess of proceeds of sale. Cooper's Appeal, 2 Casey 262 Pa. (1856).

The confusion arising from the sheriff's seizure of the firm stock for separate, as well as for joint, claims was obviated in Pennsylvania by a statute.[g] The act was passed to authorize the sale by a *fi. fa.* of the rights, claims or credits of a firm, but the language was comprehensive, and the courts gladly utilized it to get rid of the snarl introduced into the law by Doner v. Stauffer. A special *fi. fa.* was authorized to sell a partner's interest without levying on the firm stock. If two *fi. fas.* issue, the first in the Common law, and the second in the statutory form, the second will take precedence.[h] The sheriff was not bound to execute the first, but if he did, it was only in subordination to the second. If neither writ is in the statutory form, the writ which effected the sale and made the money will take the proceeds, although

execution had been levied under the earlier writ. No lien is acquired by an execution in the discarded form.[1]

g. 8 April, 1873, P. L. 65.

h. *Special fi. fa. under Act, 1873, to sell partner's interest in a firm, necessary to hold sheriff or create a lien.* A obtained judgment against B *et al.*, 9 June, 1875, and issued *fi. fa.* to D, the sheriff, on that date. On 9 July, 1875, E obtained judgment against B *et al.*, and, 14 July, 1875, issued a *fi. fa.* to D, which directed him to levy upon B's interest in firms of F & Co. and G & Co., each having its chief place of business in the county. D sold B's interest on E's *fi. fa.*, and paid the proceeds into court, which awarded them to E, and the S. C. affirmed the award. A then sued D.—Judgment for D. Sheriff not bound to levy on B's partnership interests until he received a special *fi. fa.* under 8 April, 1873, P. L. 65, and could not do it or appropriate the proceeds of a sale on E's execution. Hare v. Commonwealth, 11 Norris 141 (1875).

i. *If neither execution for sale of partner's interest in a firm follows requirement of 8 April, 1873, proceeds go to the writ which raised them by a sale.* A's *fi. fa.* was levied in August, 1878; B's *als. fi. fa.* was levied in September, and partnership interest of D in D & Co. sold 30 September, 1878, for $800. A issued, 28 September, 1878, *vend. ex.*, and E, sheriff, returned, in October, that he had sold on A's writ, and he paid the proceeds into court, which awarded them to A.—Reversed. Neither execution complied with the statutory requirement. A's execution, therefore, created no lien, and the sale was not made on A's writ, because it had been returned, and *vend. ex.* issued two days before the sale was made. The proceeds belong to B, as the sale was made on his writ. Kain's Appeal, 11 Norris 276 (1879).

May a partner dispose of his title by anticipation, and retain no share of the partnership stock, so that the separate execution against the capitalist partner would cut out the firm execution? It was so held, while the stock remained unchanged,[j] but any sales and replenishing would be on joint credit, and convert the stock into partnership property.[k]

j. York Co. Bank's Appeal, § 25, n. 3.

k. Walter's Appeal, § 25, n. 5.

9. Would execution on a judgment confessed by a firm for a partner's separate debt cut out a subsequent joint execution for a firm debt? The firm owns its assets, and may dispose of them as it likes. Even its promise to pay a separate execution devotes the joint assets to the separate claim in preference to a joint execution.[a]

Why could this not be done if payment of the separate execution would render the firm insolvent? The payment of a partner's individual debt is no consideration to the firm, and is a gift which can be made only when sufficient property is left to pay all the firm

debts.[b] Does the title pass? The title passes, because the firm is bound by its own act, although a fraud upon its creditors, and they are the only ones who can take advantage of the fraud to impeach the transfer. Could an assignee for creditors set aside the fraudulent disposition? It was held not,[c] though the reason was defective, and no longer obtains.[d]

a. *Confessed judgment by firm, when insolvent, for separate debt of partner cuts out firm creditors.* A lent B, partner of C, $2,200, and loan remained B's individual debt for 5 years. Then B & C confessed judgment to A for the debt. A year afterwards, the firm failed. A feigned issue to try title to proceeds of firm assets between A and firm creditors.—Judgment for A. The firm creditors had no standing to impeach the transaction, because they derived all the right they had from the partners, who made the change. The insolvency of the firm did not affect the validity of the substitution, because the partners could prefer creditors, and therefore create or pay debts up to the date when insolvency was declared. Siegel v. Chidsey, 4 Cas. 279, Pa. (1857).

Agreement to appropriate firm assets to separate debt gives it precedence over subsequent execution against firm. D obtained judgment against B, and issued execution against B's interest in B & C. C promised to pay the amount of execution thus levied on firm effects, if sheriff would forbear. A *et al.*, firm creditors, levied on stock, and, upon distribution of proceeds, claimed priority.—Judgment for D. Promise by C gave separate debt a preference over subsequent levy for the obligation contracted by the firm. The promise was treated as an agreement to devote the joint property to the separate debt. Snodgrass' Appeal, 1 Harris 471 (1850).

b. *Insolvent firm can't pay separate debt with joint stock.* A was creditor of B & C, succeeded by B, C & D, who, when insolvent, delivered goods to A, in satisfaction of his claim. Evidence that D also was indebted to A. Creditors of B, C & D seized and sold the goods in A's possession. A sued sheriff.—Court charged that unless jury found a debt from D, the payment was fraudulent, not because of preference, but because an insolvent firm cannot pay separate debts of one partner with joint stock. Walsh v. Kelly, 42 Barb. 98; s. c. 27 How. Pr. 559 N. Y. (1864).

Under agreement for indemnity, creditors of old firm co-ordinated with creditors of new. Partners may pay separate debts with firm property only in proportion to their shares. C & D bought out B, and agreed to pay the firm debts. Three months later, C & D failed, and having unequal shares in the firm stoek, assigned to E to pay (1) debts of C & D, and (2) their separate debts, without reference to partner's quotas. A, though creditor of old firm, claimed, by virtue of agreement with B, to be a creditor of new firm, and brought bill to set aside assignment.—Could not object to preference of creditors of new firm, but distribution of stock among separate creditors of C & D, without reference to partner's share, avoided the assignment. Smith v. Howard, 20 How. Pr. 121 N. Y. (1859).

Assignment by continuing firm for separate and prior firm debts, which it assumed, and for partner's administration funds, which it used, is not fraudulent, unless no separate debts. B & Co. bought out B & C, and agreed to pay the firm debts. B & Co. failed, and

assigned to A, to pay (1) a creditor of B & C, (2) money used by B as administrator in B & Co., (3) individual board bills assumed by B & Co., and (4) their separate creditors. The goods were seized and sold by B & Co.'s creditors, and A sued them for the price. Defence: Assignment fraudulent, on account of preference and appropriation to separate debts.—Recovered. Debts of prior firm and of individual partners became debts of continuing firm. Absence of separate debts rebutted presumption of fraud. Turner v. Jaycox, 40 N. Y. 470 (1869).

c. Assignee, agent of assignor, not of creditors. B took all effects of firm, B & C, and agreed to pay its debts. He subsequently formed a limited partnership with two other persons, in which he was the general partner. He then transferred certain demands of B & C to A, as security for private debt, and on same day made a general assignment for benefit of his creditors to D. Suit was brought by A to recover money collected by D on claims assigned to A by B.—The appropriation to A was valid as to creditors of B & C, though the special partners or the creditors of the limited partnership might set it aside, because the assignment is made void by statute. The assignees for creditors stand in the shoes of the assignor, and cannot impeach his transaction. Bullitt v. M. E. Church, 2 Casey 108, Pa. (1856).

d. Amsink v. Bean, *supra* n. 2, *b*.

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§107.

The doctrine of destination, as applied to partnership, is an outgrowth of the partner's joint tenancy for which it is the next equity equivalent.

In the application of this doctrine, the destination given to the firm property originally by the partners makes a court administer it as firm assets, and no transfer by partners will release the fund from the joint debts, unless the firm was solvent, or an equivalent was received for the assignment made in good faith, and with the intention to discharge the assets of the original liability. In a leading case, the firm was composed of four. One retired, and the three continued the business, with assets about equal to their liabilities, excepting the large debt to the retiring partner. He re-entered the firm for a year, stipu-

lating for re-payment of his debts, and the balance, after payment of other debts, to be divided among his co-partners. This was, in effect, paying a partner with the firm assets, when the firm could not pay its creditors. He was held liable for the amount withdrawn from the firm assets.[1] The right of the creditors is derived from the partner's equity to have the good applied to payment of firm debts. The assignee in bankruptcy of the firm could reclaim a payment made by his co-partners, in fraud of creditors.[2] On dissolution, one partner made over the firm assets to his co-partner, who agreed to pay the firm debts, and indemnify him against them. The funds transferred enabled him to pay, and his *personal* obligation enured to the creditors *in addition* to their claim against the firm. They might come in upon his separate estate, like his individual creditors.[3] If the firm stock is sold, and the proceeds applied to a partner's individual debt, the sale is void against firm creditors, and the stock is subject to their execution.[4] Unless the firm is solvent, neither partner can make or accept an assignment of firm property for his individual account.[5] If the transfer would make the firm insolvent, the assignment is void.

1. Potter v. Magee, § 106, n. 2, *a*.
2. Amsinck v. Dean, § 106, n. 2, *b*.
3. In re Long, § 106, n. 2, *c*.

When a partner sells out, the assets go to the new firm, subject to the prior firm's debts. A partner retired, and his co-partners continued the business with the firm assets, and assumed the debts of the old firm, executing a joint bond of indemnity.—The retired partner's liability continued primarily for the old firm's debts, and he was entitled to subrogation for the debts which he was compelled to pay, not only against the individuals who executed the bond, but against the firm. Frow, Jacobs & Co.'s Estate, 23 Smith 459, Pa. (1873).

The contrary had been decided as the law of Pennsylvania, prior to this decision. A firm of five members was succeeded by three of them, and later by an assignment of one's share, of two. Then the two assigned all their stock for the benefit of their creditors. The

creditors of the first two firms claimed a share in the fund.—Excluded, as their equities must be worked out through the partner's lien, which had been renounced. Limiting a partner to the payment of the firm debts, is his co-partner's equity, but not the creditors, who have no lien on the stock. A change of the assets by the partners puts an end to the creditors' preference. A sale by a partner to his co-partner in consideration of his payment of the firm debts, is a *personal* contract, and creates no lien. If the co-partner disposes of the assets, and does not pay the firm liabilities, the preference of the firm creditors engrafted on his equity dies with its stock. Baker's Appeal, 9 Harris 76, Pa. (1853).

4. Menagh v. Whitwell, § 103, n. 4; Goodbar v. Cary, § 106, n. 1, *b;* Ferson v. Monroe, § 106. n. 1, *c;* Johnston v. Straus, § 106, n. 1, *d.*

5. *Partners cannot withdraw property, unless solvent.* B & C, partners in brickmaking, with lease of a colliery. Embarrassed by suits, they tried to raise money, but failing to obtain credit, B assigned to C, who undertook to carry on the business and indemnify B against debts. Firm creditor brought bill to avoid assignment.—Decree. WESTBURY, Lord Ch.: "Taking * the principle of law which is embodied "in the Statute of Eliz., c. 5, and applying that to the transaction, I "think that it was not competent for one to make or for the other to "accept an assignment of that description, both of them being insolv- "ent at the time." Ex parte Mayou, 4 DeG. J. & S. 664 (1865).

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§108.

The preference given to firm creditors can not be explained on any theory of credit, nor by anything but joint tenancy.

Leaving out of view the historical fact that equity simply supplied its process for the ascertainment of a partner's share upon a determination of the joint estate,[1] various theories have been suggested to account for the course of distribution in equity. They naturally do not go to the source of the change, and explain the cause which brought about the departure from the contract system. The notion of credit, that as the joint creditors relied upon the firm assets, the separate creditors looked to the separate estate for payment, is an assumption.[2] It contradicts the experience which imputes to every man a knowledge of the law.

The credit would depend upon the estate the debtor had. The partners have joint and separate estates, which are both subject to the firm's debts. The credit would, of course, be given in reliance upon both estates. The partner has a resulting interest in the firm after all its debts are paid, and his separate estate, which is also subject to the firm debts. His creditor could expect nothing from the partner's share until the firm creditors had been satisfied, and he could share only the separate estate with them, unless insolvency supervened, which, under the makeshift rule of convenience, would give him a paramount title to the separate fund. The credit given to a debtor is not the cause of his estate, but a consequence of his possessing the means to pay the debt.

The Roman lawyers, as might have been anticipated, worked out the equities of each class of creditors without inconsistency, and on principle. Their starting point was that the joint debts created or increased the partnership fund, while the separate debts formed or enlarged the individual partner's estate. From this origin of the funds, an equity, it was conceived, arises, which appropriates them, upon insolvency, to the creditors, who, respectively, contributed to create them. This rule was sustained by analogy to the law of sale. The price, with the civilians, stood for the merchandise, and if the consideration was not paid, the property might be reclaimed, although the sale had been completed, by delivery to the buyer. The contract, though executed, was rescinded by non-payment.[3] They followed the property, as equity lawyers do a trust fund, as long as its identity could be traced. When the property lost its

distinctive character, and became merged in the mass of the debtor's estate, the creditor was entitled to an equivalent out of the mass for his property, which could be identified on account of the debtor's conversion of it into something else. The equity springs from a recognized liability. The firm stock stood in the place of the thing sold, and the creditors whose advances had increased the stock in the place of the seller.[4] No such analogy exists at the Common law to explain this feature of partnership. The Civil law theory of sale does not prevail at the Common law. The specific property sold and delivered to the buyer cannot be reclaimed in any event. The ownership is vested in him by the sale. Insolvency does not devest his title to any property; much less does it revest the debtor's title in the former owner. The insolvent, by his inability to meet his liabilities, is not the less, but all the more, a debtor. He owes to his creditors not the property itself, nor any other asset, but merely the price of the property. The debt is personal, without any lien or preference for its payment out of the debtor's estate. The individual partner is, however, not less liable for a firm debt than is the firm itself. The several liability of the partners is no less a constituent of the partnership obligation than is their joint obligation. Both spring from the root of partnership. The joint creditors, therefore, are entitled, at law, to share the separate estate of a partner with his individual creditors. The firm creditors are not dependent upon any equity for their preference in the distribution of the partnership assets. They have an independent right, which arises out of the partnership relation, and exists both at law

and in equity.[5] Apart from the direct liability of the individual partner for the debts of the firm, his share also is subject to them. No title vests in him until the firm debts are paid in full. His creditors, who stand in his shoes, so far from being on an equal footing with the firm creditors, have no claim against the partnership fund, so long as a single firm creditor is in existence. The individual partners, being liable for the firm debts not less than for their individual debts, may be held by the joint creditors. The only restriction which can be put upon the exercise of their right by a court of equity, is confining them to the joint fund in the first instance, so as not to deprive the separate creditors of their only fund.[6] If the partnership assets are not sufficient to pay the joint debts, then the firm creditors are entitled to come in upon the separate estate. They would share it equally with the separate creditors. As the separate creditors never had any claim upon the joint assets, they could not ask any allowance out of that fund, and, of course, no account would be taken of what the joint creditors had received from the partnership estate. Both sets of creditors would start as equal claimants upon the separate fund, and be entitled to an equal distribution of it. If the amount which the joint creditors had received from the firm assets should be deducted from their claims against the separate estate, or an equal amount allowed the separate creditors before distribution were made, they would, in fact, share the joint estate with the joint creditors. It would not be a division between them in the first instance, but the moment the separate estate is touched, the individual creditors assert the right to

participate in the joint funds by relation. They date their claims back to the distribution of the firm assets, and make the division not only of them, but of the whole consolidated fund. Though the participation of the separate creditors in the partnership assets is contingent upon the joint creditors coming in upon the separate estate, it is none the less a sharing, by the separate creditors, of the joint estate. The debtor pays his debt (in part) out of his creditors' estate. The rule of convenience, as it is called, established in bankruptcy, and followed in equity, runs counter to the principle of partnership liability. At first, the joint creditors could come in upon the separate fund only upon condition that they surrendered an equivalent, if it had been received from the joint estate.[6] They retained, after the repeal of their privilege to resort to both funds, an independent and exclusive right to the firm assets, but they lost the right, which they had previously enjoyed in addition, to resort to the separate fund on equal terms with the individual creditors. The principle of this adjustment was that each class of creditors should be remanded to its distinctive fund, because the separate creditors owned the individual partner's estate by as good a right as the joint creditors were entitled to the partnership estate.[7] The logic of the change made itself felt, and practice, in due season, embodied the precept, by creating a right in the separate creditors to take the surplus of the joint estate, after the partnership creditors had been paid in full, in return for their access to the separate estate after the individual creditors had been satisfied. The right of the separate creditor lacks not only the support of a legal liability, which

comes in aid of a joint creditor and upholds his right, but the legal liability negatives any exclusive right in the separate creditor. The joint creditors are co-owners of the separate estate. Nevertheless the legal liability is annihilated, and the right of the partnership creditors in the separate fund is extinguished.

1. The history of the method adopted to proceed against a debtor-partner's share of the joint property by execution at law, and the modification of the process under the influence of equity is accurately stated by 'F. F.' in an article entitled: "The legal and equitable rights of "individual and partnership creditors; with reference "to the taking in execution of partnership property for "the debt of a partner," published in 26 American Jurist 55: 1841.

2. Potter v. Magee, § 106, n. 2, *a;* Washburn v. Bank, § 106, n. 8, *c.*

3. At the Roman law the price was a condition of the sale, and, without payment of it, the property did not pass from the seller to the buyer. Though credit might be given or security taken, instead of payment, the nature of the transaction was then a sort of tacit mortgage of the property for the price.

„Von der Schließung des Kaufs ist die Erfüllung desselben zu unter„scheiden. Diese geschiehet von Seiten des Verkäufers durch die auf gesätz„mäßige Art bewirkte Uebergabe der Sache, von Seiten des Käufers aber „durch die Bezahlung des Kaufgeldes. Von dieser Erfüllung hängt die „Uebertragung des Eigenthums ab." 16 Glück, Erläuterung der Pandecten. § 988.

4. The modern Civil law does not revert to the Roman conception of a sale, although there is a reminiscence of the primitive theory in the *jus separationis* maintained by some authors, on the ground that the merchandise should return to the unpaid seller, and not go to and enrich a stranger. Speaking of a trader who carried on business at different places, ULPIAN said: "*Aequissimum puto separatim tributionem faciendam, ne* "*ex alterius re merceve alii indemnes fiant, alii damnum* "*sentiant.*" D. 14, 4, 16.

Streitig ist, ob eine Separation und nöthigenfalls ein Particularconcurs überall eintreten darf, wo ein Theil des Vermögens, welcher separirt und Gegenstand eines Particularconcurses werden soll, ein eigenes von den Gesetzen als solches anerkantes Gütercorpus (*universitas rerum*) ausmacht, und die Forderungen der Gläubiger mit einer solchen Gütermasse in einem

besonderen Verhältnisse stehen, wovon die einzelnen in den Gesetzen erwähnten Separationsfälle bloß Beispiele bildeten.

Einige bejahen dies und stellen als Grundsatz auf: der Particularconcurs findet in allen Fällen statt, wo bestimmte Gläubiger zu einer bestimmten, als ein eigenes Gütercorpus von dem übrigen Vermögen abzutrennenden und zur Befriedigung der an dieselbe stattfindenden Forderungen nicht genügenden Vermögensmasse in einem solchen Verfahren stehen, daß sie die Separation derselben von dem übrigen Vermögen rechtlich verlangen können. So sei namentlich den Gläubigern eines Kaufmanns, welcher mehrere getrennte Handlungen habe, das Separationsrecht zu gestatten.

Matthiae's Controversen-Lexikon des römischen Civilrechts, 171, where the authorities are collected.

5. *Joint creditors, after exhausting firm assets, come in for balance on partner's separate real estate pari passu with his separate creditors.* B, C & D, traded as B & Sons. B borrowed $5,000 of E, and title deeds of land held by B, and contract for purchase of land were deposited for preparation of mortgage to secure loan. B died before mortgage executed. Then C died. Heirs of B & C executed mortgage to E. A *et al.*, firm creditors, enjoined D, and prayed for receiver to take land bargained for, and land held by B, disputing equitable mortgage.—Decree. Land separate property of B, but equitable mortgage not proved. Firm creditors unsatisfied by firm assets, proceed for balance against separate estate with separate creditors. SIMPSON, C. J.: "We think the true doctrine is, as stated by the "Circuit Judge with respect to the right of the separate creditor, if "any equity exists in his behalf, such as two funds * to throw the "co-partnership creditors on the partnership assets in the first instance, but after the partnership assets have been fully and fairly "exhausted, to come in *pro rata* with the separate creditor. This "seems to be the weight of authority with us. Besides a debt contracted by a co-partnership, is not only a debt of the firm, but a "debt in substance of each individual member of the firm, and the "property of the firm, and of each member, is liable for it. But the "property of the firm is not liable for the separate debt of a member; only the interest of the member is liable, which is nothing "until the firm debts are paid. So that, because a co-partnership "creditor has an exclusive claim upon the firm property, it does not "follow that a separate creditor should have an exclusive claim upon "the separate property. In the first place, the effect of the contract "is to pledge as a basis of credit, both partnership and private property; in the second case, the separate property alone gives the "credit. And, as to partnership property, there is no separate property until the debts are paid, which is liable to both partnership "and separate debts by contract." Hutzler v. Phillips, 1 S. E. Rep'r 502, S. C. (1887).

6. *Firm creditor enforces partner's separate liability as a constituent of partnership. Equity controls exercise of right when creditor has joint and separate funds, and separate creditor only separate estate.* B & C, partners, as B & Co. Firm creditor, D, attached C's property for firm debt. A, creditor of C, brought bill to prevent any part of proceeds from being paid to D, and to establish a preference. Both partners bankrupt, and no firm assets.—Dismissed. Separate creditor has a right to his debtor-partner's estate only when there are both joint and separate funds, on the ground that the firm creditor should resort first to the joint fund, and exhaust it, before taking the sepa-

rate creditor's only fund. The bankruptcy rule not a principle, but a rule of thumb. Bardwell v. Perry, 19 Vt. 292 (1847).

7. Bell v. Newman, § 105, n. 1.

8. *Firm creditors not entitled to share separate estate with separate creditors for balance unpaid by joint dividend.* B & C, partners, assigned for creditors to A. Subsequently, B assigned for his creditors to A & D, and C for his to E. Firm dividend 11 per cent. Firm creditors claimed payment out of B's separate estate for amounts not paid by joint assets. A and B asked instruction of court.—Firm creditors excluded. Davis v. Howell, 20 Am. Law Reg'r N. S. 461, N. J., (1861), with note, reviewing the authorities, by Prof. HENRY WADE ROGERS.

CHAPTER VII.

§109.

THE TITLE TO PARTNERSHIP LAND.

The doctrines of equitable conversion and of equitable lien are the expedients adopted to overcome the obstacle of tenure in making land a firm asset.

Land, being the original mould of English law, so far from yielding the tenets of its tenure to the innovations of a partnership, impressed upon it, as has been remarked, a character foreign to the relation. A joint tenancy is the best expression of the partnership title to land, as well as to personalty. The notion of a tenancy in common, as the legal expression of the title to personal property vested in a partnership, has not yet entirely let go its hold upon the Professional mind. It was repugnant to Common law instincts that land should be an article of trade at all. And for this reason it has taken longer to eradicate the notion of tenancy in common in partnership land, and replace it by the theory of a joint title. The

real estate owned by a firm was held in common, and the legal title vested in the partners, as tenants in common. Upon the death of a partner, his moiety descended to his heir, who was not bound by the partnership debts, but inherited the purpart clear of all liabilities. The destination given to the property by the partners, was, in this manner, defeated, by making the legal effect of tenure override the parties' will. The rights of the firm, in real estate, had to be worked out in subservience to the exigencies of the legal title. A long development of equitable ideas was required, in order to make intention the controlling fact, which subordinated the estate to the purposes for which it was created. The transition, from the Feudal notion of tenancy in common to a theory which gives full effect to the partnership title, and adjusts it to the partners' interest, was effected, in some cases, by the fiction of a conversion, which makes personalty of the land, and, in other cases, by the doctrine of an equitable lien, which gives the firm and its creditors a paramount right to the land. The lien could be defeated only by an incumbrance upon a partner's title, which was concurrent with the acquisition of the title; such an incumbrance was recognized in equity, as well as at law. The legal and equitable would prevail over the merely equitable lien. The theory of lien was suggested by and worked out through the partner's equity, to have the land applied to the payment of the firm debts. By this equity a partner is restrained from using the land, except for the firm.

As soon as creditors were permitted to proceed against their debtors' land, they subjected to their claims lands held in joint tenancy. If the claim was

against one co-tenant, his interest might be taken, and if the claim was against both, then the whole estate. This may be seen in an early case, where the claim, though originally against one joint tenant, subsequently became, by the action of the parties, a claim against both, and a charge upon the whole estate.[1]

The title of the partners, though made subject to the debts of the firm, was not controlled beyond the exigencies of the partnership. The land, when cleared of the firm liabilities, remained vested in the partners.[2] They held, however, not in the proportion of their interests in the partnership, but in the equal division of tenants in common.[3] The theory of a conversion rectifies this defect. In England, this theory has been adopted, without qualification; so that upon dissolution the land or its proceeds are diverted from the heir, and given to the personal representatives.[4] The result of making the conversion extend beyond the requirements of the partnership, was to call forth a reaction against the fiction itself. The abuse of the principle served as the argument against its use. The counter-current disclosed itself in the decisions which sought every pretext to escape an application of the fiction, although the equity of the partnership was acknowledged and enforced. The fact that the purchase-money did not come directly from the firm, notwithstanding the purchase was made for it; or, on the other hand, that the price was paid by the firm, but the use was not declared for it, was sufficient to prevent a conversion. In either event, the firm had the equity, and the legal title was controlled to give it effect; but not by means of a con-

version. Nor if the partners were given mortgages by will, and they purchased the equity of redemption with firm money, or the devise was of a fee to them, did the land, although used for the firm, change into personalty. The right of the firm to the land is, nevertheless, recognized in equity, and the courts reverted, in giving effect to the title, to the alternative of an equitable lien. The reason for giving full recognition to the dominion of the firm, by converting its property into personal estate, which meets the requirements of the firm, is identical with the principle of the decisions which establish a conversion. It is the after-effect of altering the course of descent, which deters the courts from resorting to a fiction which interferes with the canons of devolution, without any legal justification.[6] The doctrine of equitable lien and of conversion, are both mere expedients. If the right of the firm is conceded, why should there be any hesitation in giving full effect to the title? How the title came to the firm, is of no consequence. The fact of importance, the point upon which everything turns, is that the firm has the title. The mode of acquisition is a preliminary incident, which could have no bearing upon the right, when once possessed. What has the acquisition, when effected, to do with the right of property? There is no room in law, or in reason, for the antagonism of two theories to regulate the same right.

The doctrine of conversion is brought in closer accord with the requirements of partnership by reconverting the personalty into land, the moment the objects for which it was converted are accomplished and the partnership is wound up.[1] The fiction, when thus man-

aged, does not interfere with the devolution of the property as land. The title would pass to the partners, unaffected by any separate judgments recovered against them, or separate incumbrances created by them, during the partnership. The land would be after-acquired, and, as such, would not be bound by the lien of a judgment.[7] The difficulty with the theory is in defining the moment when the re-conversion shall take place, when the rights of creditors, heirs, grantees, or others claiming through the individual partner, shall attach to his interest in the real estate. If, at the moment of dissolution, by death or otherwise, the title is still encumbered with outstanding claims; if, at the final settlement of account, this is an indefinite period, and the title to the real estate may be held in abeyance for years. How could the devise by a partner pass the land, and the reconversion relate to the decedent's death, when the will could not, by law, convey subsequently-acquired land? The decedent would either die intestate, or the land would pass as personal estate. The devisee would not acquire the land, even if the title could, by legerdemain, shift from the distributees, upon a subsequent reconversion, as he must establish his right to take at the instant of his testator's death. The subsequent shifting, though it were feasible, would be too late.[8] The fiction should not be allowed to prevent a devolution upon the decedent's death. As a creature of equity, the conversion should be controlled by equity. The land might vest in interest upon the partner's death, though not in possession until a reconversion could be effected by a settlement of the partnership accounts. This would be inconsistent with the theory which

treats a partner's share in firm real estate upon a reconversion as after-acquired land.

A judgment against a partner doesn't bind firm lands, and, it has been held, when a reconversion takes place, that the land is a new acquisition, which, being subsequent to the entry of judgment, is not bound by its lien. But it has also been held that if a partner died, and subsequently a reconversion took place, his widow would be entitled to dower.[9] The title would relate back to the husband and partner's life-time, and no one could claim except through him. If the widow's dower did not attach, neither would the heirs be entitled to the inheritance. They must claim through their ancestor, and as he could acquire only as a living, and not as a dead man, because all his rights devolved upon his death, the title must relate back and vest in him while alive. It is subject, therefore, to all the incidents and deductions which would have affected it if he had been living when it vested in him. Why, then, would not a judgment which was entered against him during his lifetime, bind the title at the moment of reconversion? Certainly not for the reason that the land is after-acquired, for if in any instance the title is carried back by relation, the hypothesis of after-acquired land is overthrown. If this relation is allowed for the widow and heirs, why not for the creditors? Might the title have been personal at the owner's death, and been changed afterwards? Then property would be shifted from executors to heirs without any notice, and by matter *in pais*. The devolution must be to one class or to the other. It could not be first to one

and then to the other, dependent upon some extraneous event.

1. Lord Abergavenny's Case, § 103, n. 2.

2. *Title to firm real estate.* Partnership owned land. B left his share to his daughter, who died. Her husband assigned his interest to A, who claimed the whole share as personalty.—Title to partnership land passes as realty to heirs of deceased partner. A acquired only husband's courtesy. Buckley v. Buckley, 11 Barb. 43, N. Y. (1850).

3. *Title to firm real estate.* Partnership held land. No mutual covenants, but intention to use it for firm purposes. Land sold on mortgages, executed by the partners. Wife of A joined in mortgages. The surplus was claimed by assignee, and by A's heir, and by his widow.—Widow allowed dower in a moiety, though husband had a two-thirds interest in the firm. Each partner's title was subject to co-partner's equity, but proceeds remained realty, and hence widow took dower. Smith v. Jackson, 2 Edwards Ch. 28, N. Y. (1833).

4. The intention of the partners, which devotes the land to the firm is not limited to the effect between the partners themselves, but is extended beyond the scope of their purpose, and alters the real nature of the property without any legal reason.

Partnership land, subject to taxation as personalty, unless re-converted by contract of partners. Partner, who afterwards retired, bought with firm funds and for the firm use land, which, upon retirement, he conveyed to B & C, the continuing partners, as joint property. B, by will, gave C option to buy his share at price fixed by last stock-taking, and to buy or rent his share of firm land. A, tax gatherer, claimed probate duty upon £22,150, price C paid executors of B's widow for his share of said land.—Recovered. Land subject to taxation as personalty. B's will could not re-convert asset into land. Binding contract requisite to effect withdrawal. Att'y Gen'l v. Hubbuck, 10 Q. B. D. 488 (1883); 13 Q. B. D. 275 (1884).

5. Law of Partnership, by ANDREW BISSET, Esq., Barrister at Law, pp. 47–56: 1847.

A covenant or agreement was, therefore, required to convert the lands into partnership assets. Coles v. Coles, § 14, n. 2.

But, in time, the intention of the partners replaced all formal requirements, and any acquisition of land for the firm was sufficient to give it the beneficial title.

Land used by nurserymen in partnership as nursery farm, became partnership stock, whether acquired by descent or by purchase. B engaged in the nursery business with his sons, C, D & E, devised his estate, including good-will of business to them, as tenants in common. They completed a purchase, negotiated by him for a farm, and took title as tenants in common. C & D bought out E, for £52,500, mortgaging the land for £23,000, and paying balance, £29,000 out of B's estate. C died, and his widow and administratrix brought bill for administration, children claimed distribution, and heir-at-law the lands.—Lands converted in personalty, and mortgages payable exclu-

sively out of personal estate. Property involved in partnership business became firm property. JAMES, L. J.: "It seems to me immaterial "how it may have been acquired by the surviving partners, whether "by descent or devise, if in fact, it was substantially involved in the "business." Waterer v. Waterer, L. R. 15, Eq. 402 (1873).

6. In this country the control over the land for the purposes of the business, is exerted without making a break or change in the course prescribed by law for the devolution of real estate. The courts, therefore, are not restrained from giving effect to the equity of the partners, or of the firm creditors by the reluctance which they would naturally feel if they were compelled to interfere with the canons of descent. The laws of descent remain intact and unaffected by the devotion of the land to partnership uses. The effect of deciding the question, whether land is firm assets or not, apart by itself freed from the consideration of its ultimate devolution, is to simplify the answer, which is thereby limited to a single point: Did the partners intend to make the land available for partnership purposes? The intention, if disclosed in any mode, is sufficient to produce the result.

Land taken for a firm debt is firm property. B & C took land in payment for a firm claim. Deed to them as tenants in common. Land inventoried on the books as firm property, and assigned by the firm for its creditors. A *et al.*, creditors of B, brought bill to set aside assignment as a fraud on them.—Dismissed. If tenants in common, assignment for firm creditors void as to separate creditors. If land belonged to firm, assignment valid. If bought with firm funds, it is a question of fact whether the land is separate or firm property. If taken for a firm debt, the presumption is against a withdrawal of capital and separate titles. Collumb v. Read, 24 N. Y. 505 (1862).

7. Conveyancing in Pennsylvania is founded on the lien of a judgment being limited to the defendant's title at the date of its entry.

Judgment does not bind after-acquired land. B confessed judgment to A in 1804. B bought a house and lot after entry of judgment and ultimately becoming insolvent, assigned the house and lot to C for creditors, in 1806. Judgment on *sci. fa.* in 1807 against B and terre tenant. Premises sold on *vend ex.* in 1808.—C entitled to proceeds. Colhoun v. Snider, 6 Binney 135, Pa. (1813).

Judgment against partner does not bind his interest in partnership land. In a partnership to buy and sell lands, A, B & Co. took title in the name of trustees. A judgment against A & B.—It did not bind their equitable estate, although that is subject to the lien of a judgment in Pennsylvania. The judgment against a partner does not bind the land for his separate debt, nor, if confessed, for a firm debt. The partner's interest is a share in the net proceeds. Kramer v. Arthurs, 7 Barr 165, (1847).

If the firm could not sell as well as mortgage clear of liens, it could not sell at all.

Firm land not bound by judgment against partner for his quota of price. B, C & D bought land for the firm, and took a deed to themselves as partners. B confessed judgment for his quota of the price to E, the vendor. Subsequently, B, C & D mortgaged the land to A, who claimed the proceeds of sale of the land under a foreclosure of his mortgage.—Held, that the mortgage was a paramount lien. The title was in the partners, not as tenants in common, and B had no tangible interest until a settlement of the joint estate; and the fact that the judgment was confessed for purchase-money, made no difference. Lancaster Bank v. Myley, 1 Harris 544, Pa. (1850).

If the judgments against a partner would bind his share of the firm land, the object of the partnership would be defeated.

Judgment against partner does not bind his interest in firm land. A, B & Co. bought land as partnership property. Part of the price was paid, though B gave a judgment note for his quota, and a mortgage was given for the balance. B sold out his share to his co-partners, and they conveyed the premises before a *sci. fa.* was brought to revive the judgment.—The judgment did not attach B's share, which passed clear of its lien to co-partners and their grantees. Meily v. Wood, 21 Sm. 488, Pa. (1872).

8. The right once vested could not be devested by a subsequent dissolution and liquidation.

The notion that a firm can endure, in spite of a partner's death, is not tenable (Ch. IV). The representatives may become partners, and contribute the deceased partner's estate; but his personal liability is at an end, and their liability is, if enforced, a new and different constituent. The attempt to carry out the notion ends in confusion. The deceased partner's title would not pass upon his death, but would be suspended upon a subsequent and contingent event; and yet it does pass, and must pass immediately upon his death. Nor can there be a provisional descent or distribution in the alternative subject to a recall and reversal of the course of devolution.

Death of partner does not re-convert his share of firm land, especially if articles continue partnership in spite of his death. B *et al.*, manufacturers of iron in partnership, owned plant and adjoining land. Articles provided for firm's continuance in spite of a partner's death, and substituted his representatives. B died, leaving widow, C, and three children. C's second husband, A, brought bill and claimed, under her will, 1-3 of B, 1-5 interest in the partnership furnace. D and other children of B, claimed his share as real estate.—Decree. Land not re-converted on B's death, but remained converted during continuance of firm. Leaf's Appeal, 9 Out. 505, Pa. (1884).

9. *Partner's widow takes dower in husband's share of partnership land.* A & B, equal partners, owned land, some of which had been

conveyed to them as tenants in common, but all of which was purchased with the money of the firm, and held by it as partnership property. A died. By a decree of Orphans' Court, expressly removing all doubts as to lands conveyed to the firm as tenants in common, and not as partners, the firm lands were sold to B. Under a settlement with those interested in A's estate, B took the lands, subject to the liabilities of the firm, for $25,000 paid to A's representatives. A's widow claimed one-third, absolutely, on the ground of the conversion, which made the land personalty.—Entitled to dower, an interest for life. In *fictione juris semper subsistit aequitas;* hence the conversion of the realty ends when the purpose of the conversion is attained. Firm real estate is personalty for the payment of firm debts. The time of reconversion is the moment the partnership is wound up, and it is determined that the real estate is no longer partnership stock, nor required for its purposes. Foster's Appeal, 24 Smith 399, Pa. (1874).

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§110.

Land may be made a firm asset without resort to any fiction.

The confusion just pointed out is the result of resorting to a fiction in order to make land a firm asset. It is not necessary to declare land to be personalty in order to subject it to the requirements of the firm business. All that is necessary is to apply to land the principles which govern the partnership relation. If it is objected that there is a necessary conflict between partnership principles and some of the rules which govern the title to land, the answer is that this conflict is not abrogated by the interjection of a fiction. Why not do, without disguise, what is done in fact; that is, mould the rules which govern real estate to the requirements of the partnership relation. Such a course would certainly be more consistent with the dignity of legal reasoning.

After all, what is meant by the statement that land becomes personal property? It simply means that the title is controlled as a firm asset. The incidents

of land remain unchanged. It can be proceeded against, dealt with, conveyed, encumbered, or devised only according to the rules which govern land.

The land, in spite of its conversion in equity, retains all the physical and legal incidents of real estate. The legal holder is merely converted into a trustee for the partnership. The heir might as well be the depositary of the legal title as was his ancestor the partner. The land is not changed in any of its properties. It serves as a qualification for a member of parliament. The partners, in selling, have a vendor's lien for the purchase-money. The land is taxed as real estate, and is exempt from the taxation laid upon personal property. The sheriff could not sell the land on a *fi. fa.*, without an inquisition. A division of the partner's share would require a partition. The title must be conveyed according to its nature as land. A deed or mortgage of it could be made by a partnership only in the form of a conveyance and by a joinder of all the partners. It is within the statute of frauds. If a conversion affected the legal attributes of the land, it might be sold by a constable, who has no power to touch real estate, or a partner might sell it as a chattel, without consulting his co-partner. Upon the death of a partner, the land would go to the survivor, who would be compelled merely to account for it as an asset.

The title in any or in all the partners, as individuals, will be controlled for the firm. The destination of the land controls the title, and no partner can withdraw his share from the firm or prevent the firm's use of the land until a settlement.[1] Where equity is not available in Common-law actions, proof of the fact

would enable the firm to secure the enjoyment of land, if the title was in the partners as individuals. The firm claim would depend upon the partner's mutual covenants, or upon an inadequate remedy at law to raise an equity, which Chancery would enforce. A partner who put the title of land, bought with firm funds, in his wife, prevented his co-partner's suit at law, and gave him a right to enforce the firm title in equity.[2] If a purchaser refused to accept a deed of the surviving partner, he could compel the co-partner's heir to join in the deed. The equitable title being vested in the firm, the legal title would be controlled for the beneficiary, even after descent cast.[3] A partner could compete with the separate creditor of his co-partner. If the balance of account in favor of the partner would absorb the proceeds of the land, the separate creditor would be excluded.

The separate creditor acquires no lien by means of a judgment against his debtor upon the equitable title of the firm. Nor does an execution or attachment add anything to the creditor's standing. His process is without avail, because it is against the legal title, which is subordinated to the equitable estate.[5]

The improvements made by a firm upon the separate property of a partner, belong to the firm. The consideration which moved from the firm makes the title-holder a trustee, and prevents him from appropriating the land without making compensation for the outlay. A foundry erected upon the land of a partner was destroyed during the partnership, and it was rebuilt with firm funds. The equitable title to the increase caused by the structure was in the firm,

and it could make the partner account for the enhancement.[6]

The partner holding title has it in his power to convey to a *bona fide* purchaser, and to pass a good title against the firm. The purchaser would take clear of the firm, unless he had notice of its title before he contracted his claim.[7] Notice of the firm title would prevent a purchaser from claiming against it, and make him take subject to it.[8] If he had not paid the whole purchase-money, he would account to the firm for the balance.[9] A separate creditor could be compelled to sell subject to the firm title.[10]

If a partner delivers firm stock to his separate creditor, who accepts it in the belief that the property belonged to the individual debtor, he does not acquire title against the firm.[11] No consideration moved to the firm for the transfer. The partner could not give away firm stock, and his appropriation of it to his separate debt is equivalent to a gift by the firm. The disposition by the title-holder of partnership land stands upon a different footing. The legal title is vested in the partner. He exerts the right which corresponds to his title. The purchaser, if *bona fide*, relies upon the legal investiture of title. The firm stock is personalty, and parties deal with the possessor at their risk. They cannot assume, but must prove his capacity to dispose of the property.

1. Land survives upon the partner's death to his copartners for a settlement.

Land purchased by the firm becomes firm property, though the conveyance be made to the partners in common. The agent of B, C & Co. bought lands with firm money, for firm purposes, but had the deed made to the partners as individuals. Land was used in accordance with original intention. C, a member of the firm, died shortly before the land was sold on a purchase-money mortgage. A, who was also a partner with B, C & Co., and his executor, claimed

aliquot shares in surplus, after payment of the mortgage, in lieu of their purparts in the land, as executor of C, and in his personal capacity. B & Co., the continuing firm, also claimed the excess as partnership assets.—Awarded to B & Co. Abbott's Appeal, 14 Wright 234, Pa. (1865).

2. *Equity, to make co-partner and wife account for lands bought with firm funds, not barred by statute of limitations.* A brought bill for account against co-partner B, who had bought land with firm funds, and put title in his wife. B demurred.—Overruled. A had no adequate remedy at law, and statute of limitations no bar, if A an equity, and not a legal right. Partridge v. Wells, 3 Stew. 176, N. J. (1878).

3. *Land equitable assets.* Land bought for firm. B took title in his own name, conveyed to A undivided half, and died, leaving child, C. A sold a portion to D, to raise money for payment of firm debts. D refused to accept deed, because A owned but an undivided half. A brought bill for specific performance, and made C a co-defendant, to compel him to join in executing the deed.—Decree. Equitable title and control in A, as surviving partner. C trustee of his moiety for firm. Between partners and creditors, firm land treated as personalty. Delmonico v. Guillaume, 2 Sandf. Ch. 366, N. Y. (1845).

4. *Land equitable assets of firm.* A & B, partners, took land, subject to mortgage, in payment of firm claim. On dissolution, A paid firm debts to extent of $5,000 in excess of his proportion. A separate creditor recovered judgment against B. The premises were sold under the mortgage. A recovered one-half the surplus as owner, and claimed reimbursement out of the other half in exclusion of separate creditor.—Recovered, because land belonged, in equity, to the firm, though held by the partners as tenants in common. A was subrogated to rights of firm creditors. Buchan v. Sumner, 2 Barb. Ch. 165, N. Y. (1847).

5. Shanks v. Klein, § 106, n. 7, *a*.

6. Clark's Appeal, § 29, n. 4.

The evidence must show improvements made by or for firm.

A partner's real estate not contributed to firm, unless the substance of its transactions. B, in 1869, took his sons, C and D, into business. They traded as B's Sons. He built a brewery and fitted it up on his land. The firm failed in 1872, and assigned for creditors. B also assigned for his separate creditors. E, firm assignee, petitioned that F, B's separate assignee should account for real estate.—Judgment for F. No proof that B contributed the premises to firm. Goepper v. Kinsinger, 39 Ohio St. 429 (1883).

7. At least, if secured by mortgage.

Mortgage of partner's land without notice carries firm improvements. A & B were partners as nurserymen. Firm planted trees upon B's land. At a sale of the land on a mortgage given by B, A gave notice of his claim for half the value of trees.—Notice to purchaser of no avail, unless mortgagee had notice when the mortgage was executed. Trees would not have been fixtures between the partners. King v. Wilcomb, 7 Barb. 263, N. Y. (1849).

8. *Equitable title of firm to land binds purchaser with notice.* B, C, D & E, partners, as glass manufacturers. The land for the glassworks was bought with firm funds, though title was taken in individ-

ual names. B & C conveyed an undivided 1-2 of the land to F, who had knowledge of firm's equity. Four days later, the firm assigned for benefit of creditors, and assignee contested F's title. F had knowledge of firm's equitable claim, and took subject to it. Mattock v. James, 2 Beas. 126, N. J. (1860).

9. *Improvements in partner's land, made with firm goods, belong to firm.* Devoney v. Mahoney, § 28, n. 3.

10. Where a firm creditor had accepted a judgment against the partner holding title, his claim was merged in an individual judgment, and yet he did not have the rights of a separate judgment-creditor, because his claim, having been joint, was a credit to the firm, and not a reliance upon the separate title.
Averill v. Loucks, § 93, n. 1.

11. *Separate creditor paid with firm goods liable for price.* B paid private debt to C with goods of firm, A & B. A bought out B, and sued C for price. Defence: No knowledge of firm title.—Recovered. Knowledge immaterial, because C paid no consideration to firm, and did not deal on the firm credit. Geery v. Cockroft, 1 J. & Sp. 146, N. Y. (1871).

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§111.

If the land belongs to the firm while the title is in one or more of the partners, a purchaser without notice may rely on the legal title, but creditors can rely only on the substantial ownership.

Land is not marshalled for the joint and separate lien-holders. Marshalling does not extend to liens, but they bind the land according to the dates of record.[1]

The effect of the lien depends upon the language of the title papers. A firm may take title to land in either of two ways: The deed may be made to the partners as a firm, for example, to A and B, trading as A & Co. Then they will hold the land as firm stock.[2] The conveyance puts the title in the firm, and exempts it from individual control or disposition by a partner, and from separate liens. Or the deed may be made

simply to the partners. Then they will hold as individuals, and the separate liens will bind the legal title.[3] A judgment-creditor of the firm could not be restrained from proceeding by execution against the separate partner's real estate.[4] He does not relinquish the privilege secured by his judgment, by making proof in bankruptcy, for the claim is based upon the judgment.[5] The separate creditor's equity is conceded, if at all, only against unsecured claims, and would not avail to marshal a judgment-lien.

If the title is in the firm, it is bound by a judgment obtained against the firm,[6] and the partner's separate real estate is also bound by the judgment.[7] A judgment against the firm takes precedence of a subsequent judgment against a partner upon his moiety, where the partners hold real estate as tenants in common.[8] The judgment against the firm binds each partner's land from the entry of the judgment. If the legal title is vested in one partner, though the land was bought with firm money, and for firm use, and judgments existed against the co-partner, and subsequent judgments against the firm, firm-creditors would take the proceeds. Neither set of claimants could avail themselves of the legal title, and the firm creditors are preferred, because the equitable ownership was in the firm.[9] If the co-partner sought to prove a title as tenant in common, the partner might rebut it, by proving a firm title in equity. If the legal title was in both partners as tenants in common, the separate creditors of each partner would have a legal claim, but, although they also had a lien, the equity of the firm creditors would, elsewhere than in Pennsylvania, cut them out.[10] In Pennsylvania, no partner has the

right to contradict the legal title after a lien has attached.[11] Land held by partners, as tenants in common, was put into their partnership business, which consisted in buying and selling land. The articles of co-partnership were in writing. They sold the land, and received part of the purchase-money. The balance was attached by a separate creditor, under his judgment in the purchaser's hands. The attachment was an election to treat the fund as personalty, which could be proved by parol to be partnership assets; but the proceeds stood in the place of the title, which was bound by the lien.[12]

A judgment against a partner does not bind his quota of the land when the title is put in the firm. His share is only an ultimate balance of account, and entitles him to no part of any specific asset. The judgment would not have anything to bind until the balance was struck, and then the portion of land would go to him as a new acquisition.[13]

Land will be marshalled between joint and separate creditors. The partner's right should enure to the creditors, and entitle them to claim the land where the firm has the equitable title, as a partner should be subrogated to the creditors whom he has paid and be reimbursed out of the equitable title of the firm to land held in common. The mortgage by a partner of his separate estate for a firm debt makes the land security for a joint claim, and, to the extent of the mortgage, firm assets between joint and separate creditors.[14]

After the liens against the title-holder are satisfied, the land will be marshalled in favor of the equitable owner. A purchaser from a partner of land bought with firm assets, and for firm purposes, is made to pay

the balance of the price to the firm, although the legal title is in the vendor.[15]

1. *No marshalling of judgment-creditor's lien.* D took real estate of each partner in execution on his judgment against B & C. B subsequently assigned, for creditors, to A, and B & C also assigned for creditors, to E. C was insolvent. A & E enjoined D, on ground (1) estopped by proof of claim under assignment against B & C; (2) could not take separate estate until separate creditors paid in full. C's answer: Claim made expressly on judgment, and no relinquishment of any privilege secured by his judgment. Injunction dissolved. Equitable rule can't deprive C of the lien of his judgment. Howell v. Teel, 2 Stew. 490, N. J. (1878). Note by Reporter.

2. Lauffer v. Cavett, § 10, n. 2.

3. *Nothing but record title in firm a bar to judgment against a partner.* A recovered judgment against B, 19 October, 1876, for $511.11. 23 October, 1876, firm of B & C, engaged in buying and selling real estate, assigned for creditors, to D. 29 September, 1881, A brought *sci. fa.* to revive. D's affidavit of defence: B no interest, except as a partner in the real estate, which "was all the property of the partnership," and not sufficient to pay its lien creditors.—Judgment for want of a sufficient affidavit. Facts not set forth: 1, deed vesting title in firm; 2, contract, recorded, by partners to hold real estate as firm stock, or, 3, notice to individual creditor of firm title before debt contracted. Revival would prejudice nothing. Kepler v. Erie Dime Savings & Loan Co., 5 Out. 602, Pa. (1882).
Supra, n. 1.

4. Wisham v. Lippincott, § 79, n. 1.

5. Howell v. Teel, *supra* n. 1.

6. *Judgment against the firm binds its real estate.* B & C, for loans made to the firm, gave judgment notes to A *et al.*, and they entered them up against the firm, which owned real estate. The assignee in bankruptcy sold the real estate, and claimed the proceeds, which A *et. al.*, disputed with him. The register ruled out the judgment creditors, because no lien could attach to firm real estate, which is personal property.—Judgment for A *et. al.* Firm real estate retains its incidents for lien of judgment, as well as by mortgage. In re Codding, 9 Fed. Reporter 849 (1881).

7. *Judgment against firm binds partner's separate real estate.* D *et al.*, firm creditors, recovered judgment against B & Co., in 1852. A, separate creditor of B, recovered judgment against him, and sold his land. A claimed priority out of proceeds.—Judgment for D *et al.* Priority of record lien determines who takes precedence in payment. Cumming's Appeal, 1 Casey 268, Pa. (1855).

8. *Equitable title bought for a firm, and with its money, is bound by judgment against a partner, where articles do not call for a conveyance to the firm.* A, B, C & D, partners, by articles, in 1872, agreed to buy of E, for themselves, their heirs and assigns, a tract of land for their lumber business. D did not sign the articles, and no deed was made. The land was used in the business, and part payment made with firm funds. Judgments were recovered against C & D. The firm, 1875, agreed to sell the tract to F, who refused the title. In 1876 the firm assigned their interest to E, and all brought specific

performance.—Decree, with deductions of judgments against C & D. E agreed to convey to the four, and his renouncing D's covenant for payment would not alter the conveyance. Holt's Appeal, 2 Outerbridge 257, Pa. (1881).

9. *Separate judgment against partner not holding title, gives no lien.* B, partner with C, purchased land with firm money, taking the title in his own name. The land was intended for firm purposes, and so used. A recovered judgment against C, his private debtor, and subsequently B confessed judgment to D, a firm creditor. Other firm creditors had judgments against the firm on which executions issued. The proceeds of sheriff's sale were paid into court for distribution.—The lot was partnership property, and the partners were not tenants in common. The judgment of A was no lien. At most he could only have sold C's interest, and that was personal and not subject to a lien. Proceeds awarded to firm execution-creditors. Erwin's Appeal, 3 Wr. 535, Pa. (1861).

10. *Judgment against separate partners holding legal title to firm land bind only their interests after firm debts, though subsequently contracted, are paid.* B & C, partners, bought and used for firm, land, taking title as tenants in common. A recovered a judgment in 1871, and another in 1876, against B and C for separate liabilities. Subsequently D obtained judgment against B & C for a firm debt. Upon C's death and insolvency of firm, A claimed priority by virtue of his statutory liens.—Judgment for D. A's liens subject to D's equity to apply assets to firm debts. Page v. Thomas, 43 Ohio St. 38 (1885).

11. Where the deed is made to the partners as individuals, without more, they will hold as tenants in common, and no equity will arise to the firm, although the consideration may have moved from the partnership, and the property have been used for firm purposes, and improved with firm funds. No oral evidence will be admitted to contradict the record, to transfer title and affect creditors.

Record settles whether land is joint or separate. E & B held land during partnership as tenants in common. C, on judgment against E for a private debt, levied on and sold moiety of the land which he had sold to D. A, a creditor of the firm E & B, claimed paramount title, offering parol evidence to prove that, while the deed was to E & B as tenants in common, it was purchased with partnership funds for partnership purposes, and E had retired, leaving land to B for settlement of firm debts; urging that being firm property, by a resulting trust, according to the principles of equity, it was pledged to partnership creditors, and that lien of separate creditors should be subordinated to equities of the partners.—Such evidence is forbidden by Statute of Frauds and recording acts; the part performance claimed will not avail. The intention to rebut the deed must also be by deed. The partners owned the money, and might appropriate it to themselves as individuals, and it was their intention to do this in the present case, because there was no assertion on the deed of a partnership taking. D took E's interest without reference to the partnership liabilities. Hale v. Henrie, 2 Watts 143, Pa. (1834).

Land was bought by A & B, partners, as individuals, and the first instalment of the price was paid by them. C then joined the firm, and the balance of the price was paid by the new firm. The part-

nership funds were also expended in making improvements on the premises. It was agreed that C should have one-third of the property.—The parol agreement vested no title in him as an individual, and did not raise a resulting title in the firm. Lefevre's Appeal, 19 Smith 22, Pa. (1871).

12. Geddes' Appeal, 3 Norris 482, Pa. (1877).

13. § 109, notes 7 and 9.

14. *Partner's mortgage of his land for firm makes it pro tanto firm assets.* Lands of B & Co., in Wisconsin, were encumbered by B's debts, incurred before C joined him in the business. To obtain an extension of the indebtedness, B & Co. exchanged notes with D & Co., and C gave a mortgage on his land in New Jersey as collateral security. The mortgage was assigned to A, who brought bill for the claim, and B's alienee brought cross-bill to restrain him. Defence: Mortgage for balance of debt and Wisconsin land should be exhausted first. C, a surety for B & Co., and should compel sale of Wisconsin lands. The debt B's separate obligation.—A entitled to decree. Payment of B's debt enured to firm of B & Co., and C not a surety. Tiffany v. Crawford, 1 McCart. Ch. 278, N. J. (1862).

15. Devoney v. Mahoney, § 28, n. 3.

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§112.

Apart from the rule in Pennsylvania, where, under a record-system, the creditors are entitled to rely upon the legal title, there is no reason to exclude proof that the equitable title belongs to the firm.

The original method of converting land into firm assets was by mutual stipulation in the partnership articles. Without a contract, the land would be held in common.[1] Subsequently, conversion became a question simply of intention, and all evidence of intention became competent.[2] Taking land by the partners for a firm debt establishes a firm ownership. Although they might intend to take separate titles, and hold in common, yet taking the land in satisfaction of a firm debt would disprove a withdrawal, because the title would be acquired in the transaction

of firm business. If land held by one partner is purchased with firm money, the inference is that the title belongs to the firm, which paid for it.[4] Using land by the firm, and improving it with firm funds, make it firm property.[5]

The consideration for a deed to the partners can always be enquired into. The legal title, standing in them as tenants in common, does not correspond to their interests as partners in the firm stock. Their interests are not necessarily equal in amount, but vary, according to the quotas of the partners. Nor are they ascertained by a balance of account, struck upon a computation of all the assets. The interests of the partners in the land are fluctuating, although their shares in the partnership are equal. Fixed quotas of the land, therefore, would not represent the interests of the partners, even when they had equal shares in the firm.

The question arises: Is the creditor entitled to his debtor's equity? The creditor of a firm would stand in his debtor's shoes, and take the proceeds of its real estate. Would the separate creditor be wronged by the appropriation? He gets all that his debtor had; is a creditor entitled to more? The separate creditors have no standing to interfere with the partnership in the exertion of its right of dominion over land held for the firm by the individual partners.[6] The debt of a partner is not a lien upon the legal title. The claim does not attach itself to any property of the debtor, but remains simply his personal obligation. Without a definite hold upon the land, how can a separate creditor prevent the real owner from retaking it? Moreover, the debt does not outrank a firm debt, even upon

the debtor's separate estate, but stands merely upon a footing of equality. The creditor, too, knew that he had no preference over firm creditors when he gave the debtor credit.

The payment of the purchase-money out of partnership funds establishes the beneficial ownership in the firm, although the conveyance is made to the partners, as individuals.[7] The argument, that the partnership might do what it pleased with its own, and had manifested its will to give away the land by the deed, proves too much. No resulting trust would arise in equity, if this argument should prevail. In all cases, the deed might be treated as a donation, and the enquiry into the consideration would be immaterial. If the legal title stood in one partner, the consideration would be still more controlling, for the title could not remain in him without defrauding his copartner, who paid his proportion of the price.[8]

Notice brought home to the separate creditors takes away their right to hold against the firm creditors.[9] A bill by the firm to assert its equity, would be *lis pendens*, and prevent a separate creditor of the partner holding the legal title from claiming against the firm.[10] Even a purchaser[11] or mortgagee,[12] with knowledge of the firm's equitable title, would take subject to it, unless he is vested with a right by statute. The enactment gives him a positive right, which notice does not take away.

The wife of a deceased partner has no right to dower in land held by her husband, in common with his copartners, for the firm. The dower is subject to the paramount title of the firm, and the husband's interest in the firm assets may not, on a settlement, amount

to anything.[13] The firm creditors cut out the widow of a partner. She is dowable of what he leaves at his death. The debts accrued during his life-time, and he leaves only the balance after the debts are paid.[14] If the partner was married before he went into partnership, the debts attached after the dower; but the land is only the surplus after the payment of debts.[15]

The dower attaches subject to the firm's equitable title, or it awaits a reconversion of the land, according to the theory which prevails of the firm title to real estate. In New York, dower attaches pending the firm, and follows the legal title. As the legal title is a tenancy in common of partnership land, the widow takes dower but in a moiety, although her husband had a two-thirds interest in the firm.[16] In New York, also, her interest attaches under the equitable lien. The dower, in either event, is a life estate in the land, and not an absolute right in the personal estate. Conversely, the husband's curtesy is limited to a life interest in the share of a partnership left by a father to his married daughter.[17]

The partner holding title for the firm can convey it without his co-partner joining in the deed. He can alien it for firm purposes, with the same effect as he can dispose of personal assets.[18] A partner could not assign a lease made to his co-partner, because no legal title is vested in him, which he could assign.[19] He might sell, it seems, his share of firm real estate, subject to his co-partner's equity. He sells out his interest in land, which is specific, as he sells out his share of the personal assets. He cannot be restrained from selling out, although the sale of his interest in the property might result in breaking up the business.[20]

1. Coles v. Coles, § 14, n. 1.

At the present day, a contract would extend the conversion and assimilate land to personalty, by making it, with the personal assets, the joint and primary fund for the payment of debts.

By contract partners may convert land into a chattel, liable in the first, and not merely in the second, instance for firm debts. B & C, by contract, made land joint assets. C, by will, repeated terms, giving B power to dispose of land for settlement of business. B conveyed land in satisfaction of firm debt without reference to power. A *et al.*, heirs of C, brought ejectment.—Judgment for defendant. Contract and will converted land, and made it liable as well as personalty in first instance for firm debts. Davis v. Smith, 2 S. Rep'r 897, Ala. (1887).

2. § 109, n. 5.

3. § 109, n. 6.

4. *Partner who receives commission from co-partners for furnishing purchase-money to buy land for firm, holds title as trustee.* A having option to buy land, formed partnership with B & C to divide the tract and sell off lots for building. C agreed to advance the purchase-money, and received commission for obtaining it from A & B. He took notes from B for reimbursement in part. Profits, A 4-10, and B & C each 3-10. C took title for security, and after selling part of tract, B & C refused to continue business with A, and excluded him. A brought partition.—Decree. C trustee for A's quota, 4-10. Tenney v. Simpson, 15 P. Rep'r 187, Kan. (1887).

The New York statute prohibits a concealment of the beneficial ownership in land, and prevents a trust from resulting to the purchaser, if he puts the legal title in another.[a] The act does not apply, if the title is taken in the other's name without the purchaser's knowledge. The beneficial ownership will then result to him.

Partner taking title to land without co-partners' knowledge bought for the firm, and with its funds, is a trustee of the land as personalty. A bought city lots with firm money, but without co-partners' knowledge, took title in his individual name. They were entered on the books as firm property, and the taxes and encumbrances were paid by the funds, and entered to the credit of the firm. A died, and his heirs brought partition for the lots among themselves. The co-partners and the heirs of another deceased partner claimed the land as partnership property. Defence: By New York statute, vendee not trustee for another who pays the price.—A bought the land for the partnership, and was a trustee for the firm during its continuance, and after dissolution for the partners and their heirs. 1. Statute speaks of different persons. Vendee, as partner, paid part of the price. 2. There is equitable conversion of land bought for the firm, and the purchasing partner becomes a trustee of personalty. Fairchild v. Fairchild, 64 N. Y. 471 (1876).

a. 1 R. S. 728, § 51.

The distinction taken by the court, that the partner, or partners taking title as individuals, were not different persons within the meaning of the statute, is criti-

cised by Mr. GUY C. H. CORLISS,[a] and the point did not arise in the case, as the co-partners were not aware of the fact that the partner had taken title in his individual name. Their ignorance of the fact, brought the case within the saving of section 53.

a. Partnership Real Estate, 32 Alb. Law Journ. 284, 304, 326 (1885).

5. *Land used by firm and improved with its funds becomes firm property, which partner holding title cannot assign for creditors.* A & B partners. B contributed lands, which were used for firm business, retaining title in his name; but the lands should belong to firm when A completed certain payments. A made some payments, and firm money was expended in improving the lands. B sold out to C, whom A received as partner. C assigned for creditors, lands to D, goods to E, without A's knowledge. A enjoined.—Decree. Lands partnership property, but assignment invalid, because partner cannot delegate his discretion. Demmy v. Colt, 3 Sandf. 284, N. Y. (1850).
Black's Appeal, § 11, n. 1.

6. *Judgment against partner holding title of firm land, no lien against firm creditors.* B & C, in 1874, bought land with firm funds, but B took title. The land was conveyed, in 1876, when firm was insolvent, to D, who sold to A, the wife of B. Under judgments against B, the land was seized. A enjoined his creditors.—Decree. Land firm property, and plaintiff derived title from firm. Judgment against B gave no lien, and separate creditors entitled only to excess after payment of firm debts. Bowen v. Billings, 13 Neb. 439 (1882).

The partner's lien would prevail against the separate creditors, even with judgments, and exclude them from the firm land.

Partner may be creditor of firm, and has equitable lien on firm land held in individual name of partner. A contributed $15,000, and B, C & D, iron manufacturers in Pennsylvania, contributed the same amount in tools and machinery, which they transferred to New Jersey, where the firm bought land, taking title in the individual names of the partners, and erected buildings. B, C & D confessed judgment to their individual creditors, who sold the firm land and stock in New Jersey. A claimed that his debt was an equitable lien, which was paramount to the confessed judgments.—A entitled, as a firm creditor, to be paid out of proceeds before judgment creditors of individual partners. Uhler v. Semple, 5 C. E. Gr. 288, N. J. (1869).

7. *Title of land in partners, as tenants in common, results to firm, which pays the price. Account to date, and may be made up anew, if book inadequate.* A & B, partners. Land bought for firm place of business, and paid for in part, and mortgaged for balance by firm. Title taken by A & B as tenants in common. A brought action for distribution and account. From B's bookkeeping, balance for A $100, but not correct, and, by agreement, experts opened a new set of books. They found balance of $8,600.35, including a payment of mortgage since action brought, and charging B premium of $1,796, which he had not paid for becoming partner.—Decree. Land belonged to firm. Expert books a necessity. Mortgage properly included in account, and if premium antecedent to partnership, no demurrer to complaint. Roberts v. Eldred, 15 P. Rep's 16, Cal. (1887).

8. *Partners co-owners of land not firm assets.* B & C were partners. B had title to house subject to mortgage; house never used for firm; question: Whether bought with firm money. B conveyed, without consideration, to his mother, and died. C assigned, for firm creditors, his interest in the house. Assignee sold the interest of D. Surplus of sale under mortgage was claimed by mother and by D.—If house purchased with firm money, C owned a moiety, which would go to his separate creditors, because use of firm funds for purchase, not made for firm purposes, was a withdrawal. B's deed a *prima facie* fraud upon creditors. C was estopped by his approval, but his creditors might disregard the conveyance. If B & C had no separate creditors, the surplus goes to firm creditors, and under assignee's deed to D. Cox v. McBurney, 2 Sandf. 561, N. Y. (1849).

9. Matlack v. James, § 110, n. 8.

10. *Bill by firm for lands held by individual member, lis pendens, and affects subsequent purchaser with notice.* A *et al.* brought bill for lands as firm property, though title was held by B. C recovered judgment against B, and sold the lands at sheriff's sale to D, who brought ejectment. A enjoined him from proceeding.—Maintained. Bill *lis pendens*, and constructive notice to purchaser. Ettenborough v. Bishop, 11 C. E. Gr. 262, N. J. (1875).

11. Matlack v. James, § 110, n. 8.

An heir could assert no title, because he is a volunteer.

Judgment against surviving and executor of deceased partner charges firm land in hands of heirs. B executed bond to A in name of B & C. C died, appointing B his executor, and A obtained judgment against B personally, and *de bonis testatoris*, and upon return of *nulla bona*, brought bill to satisfy debt out of firm land.—Decree. Logan v. Greenshaw, 25 Fed. Rep'r 299 (1885), and note.

12. *Landlord's claim for rent of firm premises has priority over lien of separate partner's mortgage of his interest.* Firm of B & C were lessees of a mill. B mortgaged his interest in mill and machinery to A, who filed a bill to foreclose, and claimed priority over rent, which had accrued since date of mortgage.—Disallowed. Rent a firm debt, which was paramount to A's individual debt. Mortgage of a partner's interest, unlike an assignment, does not work a dissolution. Mechanics' Bank v. Godwin, 1 Hal. Ch. 334, N. J. (1846).

13. *Land bought with firm funds, and used exclusively for firm purposes, not liable to dower by widow of partner indebted to firm.* B and his co-partner, who had agreed that at dissolution firm property should be sold for firm debts, bought land and erected buildings upon it for their brass and iron foundry Creditors recovered judgments against them, and took the premises in execution. B, who had 1-5 of the profits, died, indebted to the firm. A, B's widow, brought bill for dower.—Dismissed. B's beneficial interest subject to firm debts, and his possession a technical seizin which gave wife no right to dower. Agreement converted land into personal estate. Greene v. Greene, 1 Ohio 535 (1823).

14. *Debts a lien on partnership land, and paramount to dower.* B & C, in partnership as builders, bought land with firm funds. B died intestate, and at his death the firm required this land for payment of its debts. A, B's widow, claimed dower. Statutory dower limited to husband's estate of inheritance.—Disallowed. Firm debts con-

stitute a lien, which dates from the acquisition of title, and enures to creditors as well as co-partners. Sumner v. Hampton, 8 Ohio 328–365 (1838).

Dower in partnership lands subject to equitable claims between partners. B & C owned firm lands. B died, leaving his widow, A, and heirs. A claimed dower.—Entitled to assignment. Land bought with firm funds, or for firm use, retains, subject to equitable claims between partners, its legal incidents. Campbell v. Campbell, 3 Stew. 415, N. J. (1879).

Code which endows widow of any legal or equitable estate possessed by husband at any time during marriage, does not extend to land held for firm. B & C formed partnership to speculate in lands. Trustee took title, and each subscriber shared profits in proportion to his contribution. Death of member did not dissolve partnership, but substituted representatives. A bought land of trustee, B's widow claimed dower.—Judgment for A. Mallory v. Russell, 32 N. W. Rep. 102, Iowa (1887).

Widow not entitled to dower in land held by husband for his firm. Firm B & C bought saw-mill property, and paid for it with firm funds, but took title as individuals. B died, and the firm was insolvent. A, widow of B, claimed dower.—Disallowed. Firm creditors entitled to land. Paige v. Paige, N. W. Rep'r 360, Iowa (1887).

15. The dower of the widow, which the decedent could not at the Common law cut out during his lifetime by any lien, is cut out by the creditor's title. Yet the widow's interest attached at marriage, and the heir's title does not begin until the decedent's death. The debts operate *ipso facto*, as a diminution of the estate, and leave the dower as an interest only in the residue. The heir during the decedent's lifetime had no interest, and when he acquired, at his ancestor's death, the title, it had already been diminished by the amount of debts against the decedent. Noakes v. Smith, 1 Yeates 238, Pa. (1793).

After the firm uses are exhausted, how does the land go? It goes back to the partners, and vests in them as land, giving the widow of a deceased partner dower, and not a third outright, and goes to the heirs and not to the personal representatives.[a]

a. Foster's Appeal, § 109, n. 9.

16. In New York, dower attaches, pending the firm, to the partner's title, which is deemed separate, on the theory of a tenancy in common; so that the widow has a legal right, and her dower is also an equity. The legal and equitable right prevail over the equitable lien of the firm creditors.[a]

a. Smith v. Jackson, § 109, n. 3.

17. Buckley v. Buckley, § 109, n. 2.

18. *Partner holding legal title to real estate for the firm, has the same power over it as over firm personalty.* B conveyed an undivided half of real estate to C, and took him in as partner. The firm being insolvent, C conveyed the said moiety to D, in part payment of a firm debt. Upon dissolution, B & C conveyed the premises to A, the receiver, who brought bill against D for a reconveyance. Argument: Real estate personal property, and subjected to partner's equitable lien, and conveyance must be by both partners, under seal. Partner holding legal title for one-half, holds moiety of it for himself, and moiety for his co-partner.—Judgment for D. Partner holding legal title for the firm has the same power over it as over firm personalty, and his conveyance for firm purposes passes the title free of the firm's equity. If trustee to co-partner for a moiety of one-half, the separate deeds of both partners to D would leave one-half of the tract unconveyed; but joint deed not necessary to convey firm title. Van Brunt v. Applegate, 44 N. Y. 544 (1871).

19. *Assignment, though for firm, must be executed by lessee.* B & C were partners. B was lessee of premises used by the firm. C assigned the lease for a firm debt. A claimed possession under assignment. No evidence that lease belonged to firm.—Only lessee can assign. Query: Is evidence of firm title competent in action at law? Otis v. Sill, 8 Barb. 102, N. Y. (1849).

20. *Partner has the right to sell his share of firm real estate, subject to co-partner's equity.* A, B & C, hotel proprietors in partnership. C sold his interest in firm real estate to D. A and B sued to avoid the conveyance, because it injured firm credit.—Judgment for defendants. Partners, unlike creditors, have no control over co-partner's disposition, which is always subject to the partner's equity. Treadwell v. Williams, 9 Bosw. 649, N. Y. (1862).

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§113.

In Pennsylvania the legal title is used to protect not only judgment-creditors who are not within the recording acts, but also general creditors of the title-holder. The title cannot be shifted, to their prejudice, by parol evidence.

As the deed is evidence of the partners' intention, they should put the title either in the firm, or in the partners as tenants in common. If no intention is expressed, they will take as tenants in common. The fact that partnership money is used to make the purchase, will not change the title, for they may prefer to own as individuals. Nor will using the land for

firm purposes overcome the form of the conveyance. The purchase, either with firm funds or for firm purposes alone, does not contradict the deed, which conveys the title to both. The means to procure the property, or the mode of its enjoyment, is not the test of ownership. If both are combined, they do not negative the intention declared by the deed, that the property belongs to the grantees, as the parties to the instrument. The price and the use, together do not show that the purchasers took in the capacity of partners, or that the title vested in them as partners for the business undertaken by them. The natural inference, that they took like ordinary grantees, which is the legal effect of the grant arising from its terms, can not be overcome or explained by parol.[2]

May the partnership, by its dereliction create in the separate creditor a right by estoppel, which the debtor did not possess? If the firm induces a credit by holding out a partner as the owner of property, which belonged to the firm, the partnership cannot assert its title against the creditor of the partner. The title which the partnership suffered to stand in the partner's name, cannot be shifted by parol evidence, after the rights of his creditors have attached. The firm cannot assert an equity without doing equity to the separate creditors whom it misled.[3]

The title might be put in the names of all the partners, as tenants in common, or in the name of one, or of any member less than all. It is the creditors of the legal holder of the land who are protected against a change of title. No other separate creditors could object to the equity of the firm, or of its

creditors. The title of the firm would prevail over any partner who did not hold the legal title.[4]

The foundation for this argument is, that the creditor contracts upon the faith of his debtor's record-title, which is pledged for the debt. The law creates no such pledge.[5] But the creditor knew, it is said, that, upon insolvency, the law sets apart the property vested in his debtor for his individual creditor, and excludes the firm creditor from recourse to it. The pinch, every creditor knows, is not during the solvency of the firm, when there are assets to pay all the debts, and when there is no thought of resorting to the separate estate. The competition arises only when the assets are insufficient, and then, in time of need, the separate creditor knows that he can look with assurance to his debtor's estate for satisfaction. The right of severance, which the 'rule of convenience' establishes upon insolvency, creates a distinct preference in favor of the separate creditor, and gives him a lien upon the estate. He is invested with a right which enables him to enjoin the partnership from intruding upon his allotted field.

The argument begs the question in dispute. It assumes that the title belongs to the individual partner. If he merely holds the title for the firm, his creditors can abstract it from the firm or its creditors with as little show of right as he could appropriate it for himself. Upon insolvency the rights of the joint and separate creditors are fixed. The commission operates as a general execution, and a joint is paramount to a separate levy, and intercepts the firm title, at any time prior to a sale.[6]

The argument did not originate in partnership law, but was transplanted by analogy from the doctrine of the lien of a decedent's debts. The peculiar doctrine of Pennsylvania, which makes land an asset for the payment of debts, accounts for the anomaly in partnership land. In Pennsylvania judgment-creditors were assimilated to purchasers and mortgagees, who contracted on the faith of the record title.[7] The judgment-creditors were not protected by the recording acts, which apply only to deeds and mortgages, but they were protected against any shifting of title, without notice, by parol evidence.[8] The inference from giving the judgment a lien was inevitable that the debtor pledged his title when the debt was contracted, not when the judgment was entered. His creditor, therefore, acquired a lien, which existed, apart from the judgment, and took effect without reference to it.

1. Land is not floating capital, and, unless involved in the business, by being the substance of its transactions, does not become firm property. §67.

The deed settles the question of title to the land. If the partners are the grantees, they will hold the title as tenants in common. The title does not result to the firm, when it pays the price and uses the land for its business.[a] The firm could appropriate its money to the partners as individuals, and the investment would be a withdrawal by the partners of property from the firm.[b] There is nothing in the price and use to rebut the title declared in the deed.[c] Parol evidence is incompetent to convert the title, and vest it in the firm.

Parol evidence, though incompetent to change the legal title, is admitted, to show whether the firm or a co-partner is the beneficial owner.

a. *Title in partner makes land separate estate.* A & B owned land, purchased with partnership assets, conveyed to A as an individual. It was used in carrying on the partnership business, and while it was so employed, A transferred to B one-fifth part of it, which represented his interest in the firm. Upon bankruptcy of firm, in controversy between creditors of firm and individual members.—Held, resulting

trust, if any, ceased to exist on conveyance to B; land became private property, according to record. A & B held as tenants in common, hence separate creditors entitled to preference. In re C. Zug & Co., 34 Legal Int. 402 (1877).

b. *Use of land does not make the proceeds firm assets, especially if divided among partners.* B, partner in railroad construction firm, conveyed undivided parts of a slate quarry to his partners. They worked the quarry, and subsequently sold it, making the price payable to each in equal parts. B received payment, and A claimed two parts, having bought out a co-partner's quota. Defence of B's administrators: Quarry partnership property.—Recovered. No evidence that quarry bought with firm funds, and if used for firm, sale and division of price a withdrawal. Shafer's Appeal, 10 Out. 49, Pa. (1884).

c. Hale v. Henrie, § 111, n. 11.

If the title is taken in the individual name of a partner, it will not result to the firm for the benefit of a co-partner. The possession is explained by the use, that is, to carry on the business. The title need not, for that purpose, be vested in the firm, but might remain in the buying partner.[d]

d. Lefevre's Appeal, § 111, n. 11.

The title would not be shifted by parol from an individual to a firm, which he forms to transact business on the land. The co-partner's going into possession with him did not exclude him, and answer for a feudal investiture, but was consistent with his ownership, as the possession might be limited to doing business on the land. There is no part-performance to take the transfer out of the statute of frauds, because the possession is joint and the owner is not excluded.[e]

e. McCormick's Appeal, § 10, n. 8; Foster's Appeal, § 109, n. 9.

A decree of court, which sold, as firm property, the title taken by the partners as tenants in common, would not convey the land. The decree could not invest the firm with the individual partner's title, or estop any one not a party to the bill from disregarding the sale, and proceeding against the record title.[f]

f. *Record title in partner fixes right of separate creditors.* D & B, who held land, used for partnership purposes, as tenants in common, received C into the firm, and conveyed to him one-third interest in the land. B died, decree for an account, a receiver appointed, and, on petition of B's administrator, court sold land to pay firm debts. A, had entered judgment against C, which bound his title as an individual, though he received it on coming into the firm as partner.—Sale could not pass title to real estate sold as firm property, but which did not really belong to the partnership. The parties to proceedings in equity were estopped from denying that the land belonged to the

firm, and their interests passed by the sale; but as to all not parties to bill, it remained, so far as sale was concerned, an open question whether or not the land was partnership assets. But a verdict and the paper title had determined this in the negative, and title to C's share did not pass. Foster v. Barnes, 31 Sm. 377, Pa. (1876).

2. *Contract to buy land as tenants in common vests title in individuals, though firm furnished the money, and firm improved premises for its business.* B & C, partners, contracted for land, and erected a building upon it, for the clothing business, which the firm carried on. The money for the purchase and improvement was furnished by the firm. The contract was upon payment, to convey to B & C, their heirs and assigns, the lot in fee. No deed was made. A obtained judgment against B.—A's lien bound by B's moiety. Erb's Estate, 1 Pearson 98, Pa. (1856).

3. If the title is vested in the partners as tenants in common, the separate creditors contract, it is held, on the faith of the record-title, which cannot be changed without their knowledge. A partner could not, by a judgment against his co-partner, devest any part of the moiety on the ground that the partnership account showed a balance in favor of the plaintiff partner.[g]

g. *Judgment-creditor of partner holding title protected against any shifting of title to firm by parol.* A & B, partners, bought lots adjoining their place of business with firm funds, but took title as tenants in common. A recovered judgment against B on a settlement of partnership accounts, and claimed payment out of fund raised by sheriff's sale under a subsequent judgment recovered against the firm.—The judgment-creditors of the title-holder were not protected by the recording acts, which apply to deeds and mortgages, but they were protected against a shifting of the title without notice, by parol evidence. Ebbert's Appeal, 20 Sm. 79, Pa. (1871).

A moiety descends, upon the partner's death, to his representative, and the surviving partner has no claim to administer the proceeds, even if the only creditors are firm creditors.[h]

h. *Land descends to representative, and surviving partner no right to administer proceeds, even if there are only firm creditors.* B & C, partners in lumbering, bought land, with firm money, for partnership use, but took title as tenants in common. C died intestate, and his administrator, D, obtained O. C. order of sale for payment of debts. The only debts were partnership debts. A, the assignee in bankruptcy of B, claimed proceeds.—Proceeds awarded D. O. C. sold estate of C, not of the partnership. A has no standing. Jones' Appeal, 20 Smith 169, Pa. (1871).

Demmy v. Colt, 3 Sandf. 284, N. Y. (1850).

4. The facts of Erwin's Appeal[i] do not raise a resulting trust to the firm against creditors of the holder of the legal title. The contest was between the creditors of the firm and the creditors of the partner who did *not*

hold the legal estate. Of course, between them, the firm title prevailed. It was a domestic affair between the partners themselves, who were entitled to the land, and, as they had the right to it, their creditors were also entitled to come upon it as a firm asset. It was disputed to be for firm purposes, and hence no resulting trust to the firm, but a resulting trust as to a moiety to the other partner, whose creditors, therefore, would be entitled to half the proceeds of a sale. The law of Pennsylvania, therefore, is that the legal title governs, not only as to mortgagees and purchasers, but also as to creditors, against any resulting trust to the firm, and Erwin's Appeal forms no exception to the rule. The principle for this policy is that the partners can invest as they please. Taking title in the name of a partner, or in partners, as tenants in common, indicates the firm's election to hold not as a firm. If the partner makes the investment in his own name, although the act is a fraud, nevertheless as the co-partners made him their partner and agent, his act within the powers of the combined members of the firm will commit them against *bona fide* dealers with him.

i. §111, n. 9.

If sufficient to change the title at all, the evidence must shift it to the firm. The transfer to the partners as tenants in common, would be but a stage in its progress, for the same evidence which took the title to the partners, as individuals, would carry it on, and vest it in them as a firm. If the use was a joint user, but not for a partnership-purpose, then the title would result to the co-partner, as to a moiety. The same amount of evidence is required to alter the title in either case; the price or the use would show a common, or a firm equity, which will control the legal title.

5. "The analogy * is all in favor of requiring express or constructive "notice to a purchaser or mortgagee of the land to affect him with "such a trust, and against it in the case of a general or judgment- "creditor. Such a one trusts the general credit of his debtor, and "not any specific property, and practically the man who sells goods "or lends money to another rarely searches the recorder's office to "see whether he has declared a trust of the property he holds." SHARSWOOD, J., Calkett v. Thomas, 1 Phila. 463 (1853).

6. *Though subsequent, a joint execution, if levied prior to a sale on separate executions, cuts them out.* B obtained judgment, August, 1883, against D. C also obtained judgment against E, September 1, each before a Justice of the Peace. F, constable, seized firm stock of D

& E, for sale September 7. D & E gave A, September 4, a judgment-note, which he entered up September 6. A issued execution September 7, before F, who sold, under separate writs, to A. G, sheriff, sold stock, September 22, to H, and delivered possession. A sued G for trespass.—Judgment for G. Interests of D and of E intercepted by joint levy before sale. *Semble.* After sale of separate interests, no joint stock left. Richards v. Allen, 44 Leg. Int. 432, Pa. (1887).

7. The Act of 1798, which limited the lien of a judgment upon revival to five years, was read into the Act of 1897, to prevent the lien of a decedent's debts from again becoming indefinite in duration upon prosecution by the creditor of his claim, according to the provisions of the Act. The ground for extending the statutory language, which was confined to *bona fide* purchasers, was that the title, if it descended to the heir, would, in the language of the preamble, be 'insecure' for the creditors who dealt with him, inasmuch as it would be subject to recall by the creditors of the ancestor.[j]

j. The re-enactment of the Act 19 April, 1794, § 11, 3 Smith's Laws 144, states the reason for the provision in the preamble to be that "inconvenience may arise from the debts of deceased persons remaining a lien on their lands and tenements an indefinite time after their "decease, whereby *bona fide* purchasers may be injured and titles "become insecure." Act 4 April, 1797, 3 Smith's laws 297–8.

The preamble referred tc two classes, who would be affected by unknown liens. They were, first, *bona fide* purchasers, who could not know what they were buying until the liens were ascertained; and, second, the heirs or volunteers who succeeded to the decedent's title. The heirs deal as owners; they have the possession, and hold themselves out to their creditors, who would be misled by a title which is insecure, because subject to recall at the suit of the ancestor's creditors.

The lien, assimilated to the judgment, in turn moulded the character of the judgment by the principle of the lien. The lien arose in the days when Pennsylvania was a Province, and when the main resource of the colonists was land. They dealt on the credit of the land.

The shifting of title by parol, after the title-holder had incurred debts, was the mischief to be remedied by the creation of a lien. He was deemed to own only what remained after his debts were deducted, like the ancestor who transmitted only this balance to his heir. If a partner held the legal title, his creditors must be satisfied before the firm could assert its title in equity. The beneficial title of the firm consisted only of the residue after all the separate debts of the partner had been deducted.

8. Judgment-creditors are protected like purchasers and incumbrances, although not within the recording acts.[k]

k. The Act of 18 March, 1775, mentions only "purchasers and mortgagees." Preamble and first section, 1 Smith Laws 422–3.

CHAPTER VIII.

THE IMPLIED POWER OF A PARTNER.

§114.

A partner has the authority to sell the firm stock in the course of trade.

The power is a necessary prerogative of a partner, because the purpose of partnership is buying and selling. The sale of all the firm stock might be sustained as a valid exercise of a partner's authority. If the stock were out of style, the custom of trade might justify closing out at a single sale the antiquated merchandise, which could not be retailed to advantage. The stock might be replaced by articles or materials of superior fitness for the business. The stock might be perishable, or a forced sale imminent. In such an emergency it is better to entrust an unrestricted power of sale to one in interest than to allow the goods to perish for want of such power, or to let it be exerted by a stranger. The question, however, depends upon the condition of the business, and upon the usage of merchants in reference to such a state of business. The authority is by no means absolute, and must be justified by exceptional circumstances, as it is the

exertion of an exceptional power.[1] To make such an unusual transaction the standard, and to give a partner general authority to sell the whole stock, would break down the safeguards established by the habits and customs of business men, who are the most competent judges and experts in reference to the due exercise of the power.[2] The attempt to define the power by statute, establishes a hard and fast rule upon the subject, and either prohibits the sale or allows it under any and all circumstances.[3]

1. *Partner must join if accessible, or sale void.* A & B were partners in the publication of a newspaper. A short time before the partnership was to expire, A filed a bill in equity against B, alleging disagreement as to the settlement of firm affairs, and praying for a receiver and an injunction against B. B filed an answer, averring willingness to buy A's share, and objecting to the appointment of a receiver. Soon after, B sold to C the newspaper and everything pertaining to it, and delivered possession. Supplementary bill by A, prayed for an injunction to restrain C from publishing the paper and renewing his other prayers. Answer by B.—Sale decreed void; perpetual injunction granted; and receiver appointed. B appealed. Decree affirmed. Sloan v. Moore, 1 Wright 217, Pa. (1860).

2. *Firm may recover on policy, though partner has, without authority, assigned firm stock.* A & B insured firm property with C & B in A's presence, but without his consent, assigned the property to D, with intent to dissolve the firm and form a company. Arrangement not consummated. A & B sued C for loss by fire.—Recovered. Assignment void as to A. Kimball v. Hamilton Fire Ins. Co., 8 Bosw. 495, N. Y. (1861).

Partner may sell entire stock in consideration of an agreement to pay a firm debt. B & C, partners for three years, bought goods of D on credit with A & E as sureties. D took, in addition, a chattel mortgage on the goods for the price. After three months, though firm solvent, B assigned, without C's knowledge, all the firm stock to A, who undertook to pay D. When C heard of the sale, he objected, and put D in possession. A brought replevin—Recovered. A partner has authority to assign any, or all, the stock for the payment of debts. Dissent.—Partner cannot break up the business by a sale of all the stock. Graser v. Stellwagen, 25 N. Y. 315 (1862).

Contra. Partner has power to sell whole firm stock for payment of a debt, without consulting co-partner. B & C, partners, at Evergreen, were in debt. B, while at Mobile, without C's knowledge, sold out firm stock to A & Co., who were creditors of the firm, in payment of the debt. Conflict of evidence as of C's ratifying sale. D, sheriff, at instance of other creditors, attached stock. A & Co. sued D and his sureties for damages.—Recovered value of stock at seizure, and interest to trial. Ellis v. Allen, 2 S. Rep'r 676, Ala. (1887).

3. *Partner's power of sale extends to entire stock of firm.* A & B, partners for dealing in cattle. B sold the whole brand to C. A sued B and C for conspiracy to defraud him of his stock. If Court found that C believed B had authority to sell—Judgment for C. Civil Code, § 2430, subdivision 3, enables partner to sell whole stock of merchandise. Crites v. Wilkinson, 65 Cal. 559 (1884).

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§115.

The limit of the purchasing power of a partner is determined by the usual course of business among firms of the given class.

Buying and selling are correlative elements of trade. A partner's right to buy, like the right to sell, is coextensive with the usage established in the particular trade. This is the foundation of the partner's power to buy.[1] Third persons, dealing with one partner as the representative of the firm, are charged with notice of the nature and extent of the firm's business, and the partner cannot bind the firm upon a contract foreign to its purpose, or largely in excess of its *prima facie* resources. There is a point where the extent of the firm business becomes a question of its nature; it becomes simply a question of degree. A partner in a small retail house cannot bind his firm upon contracts for a wholesale business. Ordinarily, the firm stock is furnished by the contributions of the partners, and must be replaced as it is sold. If the whole firm stock has been sold out, any partner may replace it, in order to carry on the business, for in the exceptional instances, as well as in the ordinary course of trade, the right to buy always corresponds with the right to sell.

Suppose parties sign articles of co-partnership, and agree that contributions shall be made in kind, and afterwards a partner purchases, on the firm credit, the goods which he agreed to contribute. Ordinarily, the firm is not liable for the price of a partner's contribution, but this principle applies only where the contribution was bought in the name of the single partner, or previous to the existence of the firm. In the case stated, the firm would clearly be liable to the innocent seller, for although the articles did not contemplate the purchase in question, yet the firm was established by the signing of the articles, and, at that time, each partner acquired all the prerogatives, and assumed all the responsibilities, incident to the relation. The purchase, being in the line of the firm business, bound the firm, for the partners are liable for the fraudulent acts of their co-partner, to all persons who innocently deal with him on their credit.[2]

A partner's implied power to buy enables him to bind his co-partner for the price of goods bought, in spite of a restriction against any purchase which is not made for cash. The seller's knowledge of the restriction will not protect the co-partner. Nothing but a return of the goods will relieve him from liability for the price. The receipt of the goods by the partner, and his use of them in the firm business, charges the partners for the benefit which they derived from the increase of the firm stock. It is not requisite that the co-partner's separate estate should derive any benefit from the purchase. He is liable for the price, because he did not disavow the sale and return the goods, as he was entitled to do.[3]

1. *The power of a partner to purchase in the name of the firm, is the correlative of his power to sell the firm stock.* B & C were partners in harness-making. B bought of A a great number of bits to be made up into bridles, which he carried away himself; but, instead of bringing to the shop, he pawned them. A sued B & C in assumpsit. —Recovered. Lord ELLENBOROUGH: "Unless the seller is guilty "of collusion, a sale to one partner is a sale to the partnership, with "whatever view the goods may be bought, and to whatever purposes "they may be applied. I will take it that [B] here meant to cheat "his co-partner; still the seller is not on that account to suffer. He "is innocent; and he had a right to suppose that the individual acted "for the partnership.' Bond v. Gibson, 1 Camp. 185 (1808).

2. Aspinwall v. Williams, § 17, n. 1.

3. *Partner restricted to buying for cash, charges co-partner for purchase on credit, if merchandise went into firm stock.* B & C's business was buying and selling sewing machines. C, active partner, and B, capitalist. C restricted by agreement to buying for cash. A, with knowledge of restriction, sold machines on credit to firm, and upon its failure sued B for balance of account. Court charged that unless B was benefitted by the purchases, he was not liable.—Reversed. B charged by addition to firm stock, although his separate estate was not increased. Johnston v. Bernheim, 86 N. Car. 339 (1882).

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§116.

A partner's implied authority is limited to simple contracts.

The right of a partner to contract for his co-partners arose from trade, which enabled him to sell his co-partner's share. As negotiation is incident to a sale, a contract is included in the transaction, as a part of it. The right is defined by trade, and must be exerted in the usual form, that is, by simple contract, which includes commercial paper.

If agency is the principle which gives a partner the power to act for his firm, what is the limit of the partner's agency? The transaction, it is said, must be within the scope of the business undertaken by the firm, and the authority to do anything incident

to the business is implied, as a part of the undertaking. The statement, though it is correct as a summary of the extent of his authority, does not bring out into prominence the barrier which confines a partner to the firm business. The counter-interest which necessitates the limitation upon the partner's power, is the liability of his co-partners, in their separate estates, for the firm liabilities. The moment a partner overleaps the boundary which circumscribes the firm business, he calls forth into the arena his copartner, who is impelled, by his separate interest, to contest the claim against the firm, and who is invested with a full standing in equity by virtue of his independent right.

The restriction imposed by the partnership, which limits a partner's authority to transactions within the province of the firm, is legal. The co-partner is not liable, at law, for any act done beyond the range of partnership business, and his defence would be, that the act was *ultra vires*. The independent right of a copartner to protect his individual estate, and confine the firm creditor in the first instance to the firm fund, is equitable. The law does not discriminate between the joint and separate estates, but charges both upon a firm obligation. It is the equity of the co-partner to repel the liability from his separate estate which prevents an immediate recovery. The right of the claimant to charge the firm assets is admitted, but when he advances against the separate estate, his right is met and counterbalanced by the co-partner's equity. The result is a collision of rights.

Should the firm be recognized as a distinct person, which exists apart from its members, the collision of

rights would come to an end. The partnership creditor would look to his debtor, the firm, for satisfaction, and the creditor's equity could be circumscribed to the partnership funds. The partner would be charged in his capacity of partner, but would not be charged as an individual, and his separate estate would not be liable for firm debts. The interference between the right of the partner and the right of the firm creditor is created by confounding the distinction which the Romans made between a partnership *bonorum universorum* and a business firm, or the distinction between different capacities. With all rights and duties in common, the partners in a brotherhood are merged in the fraternity, and cease to exist apart from it. They can do nothing, except through the firm; can acquire no independent rights, and can have no separate estate. In such a partnership, the rights and liabilities of the partners are co-extensive with the firm. But a partnership for gain is an association for a limited object. The partner is identified with the firm only to the extent of the undertaking. In all other transactions, he is a stranger to the firm. The Common law ignores his situation, and imputes to him a liability, which is independent of the firm, on the assumption that he has contributed, not only a portion, but the whole of his estate to the firm.

Furthermore, the collision would be obviated, if the partners were allowed to set apart property for firm assets. By devoting funds to a special purpose, the debtor's right would be established, to withdraw property from at least subsequent creditors, and prevent them from taking it in execution for the satisfaction of their claims. The right to withdraw property is

exceptional, and the Civilians instance only the *peculium* of the Roman law to justify the segregation.[1]

1. *Supra* § 101, n. 3.

§117.

A partner cannot bind his firm by a specialty

The seal, which precludes an inquiry into the consideration, takes away, by anticipation, the co-partner's defence to the claim. Each partner is entitled to make a defence. The judgment, if obtained against the firm, binds each partner's separate estate, becomes a lien upon his land, and entitles the plaintiff to take his personal property in execution without first exhausting the firm assets.

An exception has been established, which permits a partner to bind the firm by a seal. An executed contract, it is said, which discharges the firm, may be made under seal, for example, a partner's assignment of a mortgage in payment of a firm debt, or his release of it under seal. The firm is not bound because of the seal in such cases, but the transaction is valid without the seal.[1]

A partner is forbidden by law to use a seal in firm transactions. He can add nothing to his capacity by means of a seal, as it is an abuse of his position and a usurpation. The law is consistent, and recognizes in the seal only its worthlessness. If the transaction is valid when taken by itself, it will stand apart from the seal, which is disregarded as surplusage. A re-

lease is no exception[3] To admit the validity of a release by a partner without the receipt of payment, would enable him to give away all the firm assets by a feigned sale, followed by a release of the price. It is the receipt of the money which extinguishes the debt, and unless payment accompanies the release, it operates as a gift. As the seal does not enlarge the partner's capacity, the release does not empower him to give away the firm property.

The implied authority of a partner is limited to contracts which do not anticipate the eventual liability of his co-partners, and charge them with liability as individuals in the first instance. No partner can deprive his co-partner of his defence to an action, and commit him in advance. Hence, a seal, which admits a consideration, and excludes a defence to a claim, cannot be attached by a partner. The seal can stand, and not avoid the instrument only when it is surplusage. In the release of a debt, the payment is satisfaction; the deed is simply evidence of the transaction. If no payment were made, and a release nevertheless given, it would not bind the co-partner. He is entitled to make a defence to any claim against the firm, and cannot be precluded in advance of a hearing or investigation of the claim. The deed would not be simply evidence of the transaction; it would be equivalent to charging the firm with a like amount. The reason why a partner cannot execute a bond in the firm name, is because it might operate as a gift, by preventing the firm from disputing the consideration.[4] But if a partner could make a release which would discharge the firm debtor without payment, he could make a gift.

An executed contract imposes no additional obligation upon the firm, and is, on that account, sustained. The deed is but evidence, and does not affect the transaction. Is a power of attorney an executed contract? In form it is a deed. What is the engagement? Take a power of attorney, which accompanies a certificate of stock. The power of attorney enables the transferee of the certificate to have himself invested with the rights of a stockholder by the corporation. If the certificate invested him with the rights of a stockholder, why would a power of attorney be necessary? The necessity of a power of attorney shows that the certificate does not invest the holder with the rights of a corporator. The power of attorney binds the maker, until it is exercised, to let the grantee use the grantor's rights. The covenant is to let another do, or in other words, to do something by another, as an agent or attorney. Such a covenant is executory. Can an executory covenant fail to charge the covenantor? If it cannot, a partner has no implied power to execute the instrument. The executory contract cannot be changed by a seal. If a seal is attached, it must be disregarded, as surplusage. No implied authority exists to add a seal, and if express authority is given to contract, the seal is rejected. The only way to retain the seal, is by the authority of the co-partners to the use of it. Then the deed is executed by all the partners, and no question of its being sustained by commercial usage, and the partner's implied authority under it, arises. The denial of effect to a seal, when the right to contract exists, shows that no deed can stand. The transaction stands simply by virtue of the express authority, and the deed goes for

nothing. If implied authority should be relied on, it would be to sustain the transaction, and disregard the deed. This is unsafe, unless the thing is done. When the transaction is finished, and nothing remains to be done, it is feasible to pronounce upon the act, and declare it valid, independent of its legal embodiment. No point is decided but the character and effect of the transaction itself. It is different when the act is prospective. Then the legal form in which the undertaking is embodied, becomes the test of its validity. The transaction cannot be severed from its legal integument, and judged apart by itself; the construction is no longer of the transaction, but of the legal instrument which embodies it. The legal effect of the instrument is now the point of decision. If an instrument of the class could not be executed by a partner, without exceeding his authority, then the transaction, which depends on the instrument, is invalid.

1. *Partner has implied authority to assign mortgage as security for firm debt.* B, C & D, trading as B, C & Co., recovered judgment against E, and levied on his wife's land. E and wife mortgaged the land, as security for this judgment, to B, C & D. B assigned, in the firm name, all its claims to F, as security for debt, and sealed the assignment. It was not recorded. Subsequently C & D assigned their interest in the mortgage to G. A claimed, as his assignee, 2-3 of proceeds raised by sale under a different mortgage.—F entitled to fund. Record unnecessary, because no trust, and creditors not concerned in controversy between different assignees. Mortgage not in purparts to B, C & D, but accessory to firm debt. As assignment an executed contract which discharged the firm, the seal was surplusage. Dubois' Appeal, 2 Wright, 231, Pa. (1861).

Partner may assign a firm judgment. After dissolution members' repurchase of firm judgment presumably as partners. A, B & C, partners, recovered judgment against D, in 1857. In 1859 they assigned for creditors. Judgment was sold by assignee at auction, and bought in for partners by E, but never marked to anybody's use. C died, and B, acting for himself and as attorney for A, assigned the judgment to F, in 1866. In 1874 E assigned the judgment to A, who sued D upon it.—Judgment belonged to F. Firm, though dissolved by insolvency and assignment, having owned judgment originally as partners, presumably intended to repurchase it as such. Therefore,

B could, as partner, assign, and E had no title. Thursby v. Lidgerwood, 69 N. Y. 198 (1877).

Partner may assign mortgage of firm. B & C, partners. Mortgage assigned by B to A, who foreclosed.—Decree. Mortgage security for debt, and either partner could assign. Moses v. Halfield, 3 S. E. Rep'r 538 (1887).

2. *Partner's release without consideration, void.* A & B, who had been partners, sued C for merchandise. B released the debt, and indorsed on summons in firm-name, that all claims embodied in the trust had been settled. The understanding between A & B was that A should collect the debts, B being insolvent. No money paid for release, and it did not appear what, if any, consideration was given.—Judgment for plaintiff. Release void. Beatson v. Harris, 60 N. H. 83 (1884); s. c. 19 Cent. L. I. 275 and note.

Yet it is stated, in an endless array of cases, that a release is an exception to the rule that a partner cannot bind his co-partner by a seal.

a. *Release by partner bars action by firm.* A & B dissolved, making A liquidating partner. He released firm claim against C, in order to get benefit of his assignment for creditors. Action by A & B. A offered to prove that each received moiety of claim, that B forbade A to sign, and that action was brought for B's use.—Non-suit. Testimony irrelevant. Release barred the action. Salmon v. Davis, 4 Binn. 375, Pa. (1812).

Release the exception to rule that partner can't bind firm by a seal. Parke v. Smith, 4 W. & S. 290, Pa. (1842).

"A Practical Treatise on the Law of Partnership," by JOHN COLLYER, Barrister at law, § 468, 5th Am., from 2d Eng., Ed.: 1861.

"The Power of One Partner to Bind the Firm by a Sealed Instrument," by J. M. L. 9 Am. Law Reg'r 265, 1870.

"The Law of Partnership," by CLEMENT BATES, § 383: 1888,

3. If an outgoing partner releases a firm debtor, the copartners may disregard the release and recover from the debtor, or may sue the outgoing partner for the debt. The suit would operate as a satisfaction of the release, and discharge the debtor.

If outgoing partner releases firm claim, co-partners may sue him or the debtor. A & B bought out C. D & E, firm debtors, having knowledge of the dissolution, took a receipt from C in exchange for a receipt which they gave him for his separate debt. A & B sued C for amount of D & E's debt to firm.—Recovered. A & B might affirm C's action, and recover of him. Though action might release D & E, they were not released by the exchange of receipts. Ross v. West, 2 Bosw. 390, N. Y. (1858).

4. *Bond and warrant of attorney executed by partner in firm name, do not bind co-partner ignorant of the obligation.* B executed a bond and warrant of attorney to D, a bank, for a loan, and obtained from individual partners signatures of their firms as principals, though the signers intended them to be only sureties, among them, A & C, signed by C. B died. D entered up judgment against all of the obligors, and subsequently sued B's administrator, who confessed judgment. Not obtaining satisfaction, D levied on lands of A, and he brought bill to enjoin a sale.—Decree. Bond bound only indi-

viduals who signed the firm names. McKee v. Bank of Mt. Pleasant, 7 Ohio 463 (1836).

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§118.

Whether a seal will be treated as surplusage, or as converting the executory contract into a specialty, depends upon the question whether the case involves a general rule or is confined to a particular instance.

The courts could say, they would consider the transaction by itself, and disregard its legal panoply. They have said it in regard to executory contracts made by express authority.[1] The reason is obvious. The principal keeps the control of his actions. The agent may bind him by the act, but not by any other of the same class. If the delegation can be limited to a single transaction, the authority covers it by express reference. There is no danger of making the authority extend to other acts not contemplated, as it would if the authority was implied from the relation of the parties. The severance of the contract from its integument, cannot be effected where implied authority is in question. The authority extends to a class of transactions, and cannot be confined to a single transaction. The act cannot be individualized and interpreted by itself. The law generalizes, and lays down a principle of action, which governs all cases.[2] A man acts in a single instance. If the seal might be disregarded, and the transaction construed as if done without a deed, because the act belonged to a class which a partner could perform, no legal

effect would be given to the instrument. The classification of documents by the law, according to the dignity and solemnity of the act, which it embodied, would be undone. If a specialty could not operate as a deed, it would take effect as a contract, and no merger or conversion of the agreement into a covenant with its different legal characteristics would take place. The risk of charging the co-partners would be removed by taking away the seal, and leaving a simple contract, which a partner can make, by virtue of his implied power.[3] But as the law did not create the distinction between contracts and specialties solely for the sake of partners, neither can it vitiate the distinction merely to facilitate their transactions.

1. If the firm gives the partner authority to make the contract, his making it under seal will not vitiate the contract. It will be sustained according to the authority given, and the excess will be disregarded. The seal will be surplusage.[a]

a. *If agent has express authority to contract, a seal is disregarded as surplusage.* A sold B oil rights, or leases, in West Virginia, for a price which was payable in instalments. B authorized C, his agent, to procure an extension, which C obtained for 60 days, by giving B's note for $750 as a bonus. C sealed the note. A sued B upon it in assumpsit.—Recovered. Seal surplusage. Jones v. Horner, 10 Smith 214, Pa. (1869).

2. The partner has no implied authority to bind his firm by a contract under seal. The seal changes the character of the obligation, precludes any inquiry into the consideration, and takes away the benefit of the statute of limitations.[b]

b. *Partner no implied authority to make executory contract under seal.* A & B sued C & D in debt for failure to deliver petroleum according to a contract which D sealed without C's authority.—Charge, that no such authority implied, affirmed. Schmertz v. Shreeve, 12 Smith 457, Pa. (1869).

3. The implied authority was held sufficient in Illinois to sustain the contract made in pursuance of it. The seal being disregarded, the authority existed to make

the contract, and the execution corresponded to the power.[c]

c. *Seal surplusage under partner's implied authority. Lender may disregard a specialty executed by a partner for a loan, and recover it in assumpsit.* B executed a joint and several note, under seal, in B & C's, and also in B's name to D, for money lent the firm, with warrant of attorney attached, to confess judgment. A sued the firm in assumpsit. C's defence: B no authority to bind firm by specialty; which converted the note into a deed, and being given at the time of loan merged the simple contract.—Recovered. B's implied authority to borrow for the firm enabled him to bind it for the loan. The action not on the specialty. The seal disregarded as surplusage. Walsh v. Lennon, 98 Ill. 27 (1881).

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§119.

A partner cannot enter an appearance for the firm, so as to bind his co-partner.

The question depends upon the relation of attorney and client. The authority would, it was held at one time, be implied from the official recognition of an attorney's standing in court. He could bind, it was said, any one whom he assumed to represent. The victim must look for redress to the attorney. This was the English practice, established by some early cases in disregard of a decision, in 1785, by Lord MANSFIELD. Recently the soundness of Lord MANSFIELD'S position has been recognized, and the attorney has been stripped of any authority which has not been conferred upon him by a client.[1]

The requirement of service upon all the partners throws light upon the question of a partner's right to appear for the firm. The service is the initial step to bind the partner's separate estate. Without a service upon him the judgment does not extend to a

partner or affect him. If a partner could appear for his co-partner, why could he not accept service for him? The fact that no attempt is made by a partner to accept service for his co-partner, is an admission that the authority is not implied. The creditor gets all the satisfaction he can obtain by access to the firm assets, and by exhausting the defendant, or severed partner[3]

1. *Payment, though by court, under judgment in action by attorney for plaintiff, who never authorized attorney, is not a bar to a subsequent recovery.* A sued B in assumpsit. He pleaded a former recovery, when B paid the money into court, and A's attorney of record received the money out of court. A denied employing the attorney. —A had judgment. Robson v. Eaton, 1 T. R. 62. Lord MANSFIELD.

The credit of correcting the blunder belongs to the writer, who signs himself 'E. W.,' of a critique upon the position taken by the courts with reference to the "Retainer of Attorneys." 37 Law Mag. 72, 1847.

No costs inflicted upon plaintiff before action stayed, which attorney did not have plaintiff's authority to bring. A, plaintiff, applied for stay of proceedings, because the action was brought without his authority or knowledge. The attorney was insolvent. Defence: Court would not relieve, unless attorney insolvent, and then only on payment of costs.—Action stayed without payment of costs. Robson v. Eaton conflicts with Salkeld, upon which practice is founded and overrules it. Reynolds v. Howell, L. R. 8 Q. B. 398.

In Ohio, before the change in England, the judges refused to let an attorney steal clients, because he was an officer of the court.[a] The Supreme Court of the United States has expressed a dictum to this effect, but the facts did not call for a decision of the point. The partner appeared for his co-partner, who was not subject to the jurisdiction, and after the firm was dissolved.[b] *Vide* comment by Mr. Wm. Green, in 1 Virginia Law Journal 127 (1877). New York[c] and Pennsylvania[d] follow the obsolete English practice, by which the action will not even be stayed, unless the misrepresented client pays the costs.

a. *Judgment, though unwarranted appearance by attorney, void.* A was sued, with B & C as co-defendants, but was not served. B & C employed an attorney, who appeared and pleaded for A by mistake. Judgment went against A, and he brought a bill for a new trial.—Dismissed. Adequate remedy at law, as judgment would be set aside as void on his application. Critchfield v. Porter, 3 Ohio 519 (1828).

b. Partner cannot authorize an attorney to appear for his co-partner, at least, if the co-partner is not subject to the jurisdiction of the court, or if after dissolution. B, in Illinois, was in partnership with C, in New York. A sued them in New York for a firm debt, though after the dissolution. C employed an attorney, and A recovered judgment. He brought suit in Illinois on the judgment.—Judgment for plaintiff reversed. New York court had no jurisdiction over B. C had no authority to employ an attorney, or enter an appearance for B during the partnership, much less after its dissolution. Service measures the lack of implied authority; for judgment binds only a served partner and firm assets, but not non-served partner's separate estate. Hall v. Lanning, 1 Otto 160 (1875).

c. Judgment confessed by unauthorized attorney binds defendant until he disproves cause of action. B, an attorney for the drawer, agreed to enter special bail for A, the acceptor, who had not employed him, and subsequently confessed judgment against A. Defence: Judgment void.—Judgment maintained as security, but A let into a defence. Denton v. Noyes, 6 Johns. 295, N. Y. (1810).

d. Attorney may appear, at husband's request, for a married woman, confess judgment without warrant and pass her title by the sheriff's sale. B joined C, her husband, and executed a mortgage of her land to D. To a *sci. fa.*, which he sued out, E appeared as attorney for B and C, at C's request, and waived service. E subsequently confessed judgment. B died. To a *sci. fa.* to revive, C appeared in person, and confessed judgment individually, and as administrator of B. The premises were sold on a *lev. fa.* to F. Ejectment by A, heir of B and C, against grantees of F. A's claim: Without service, B not bound to appear. Her warrant necessary to confess judgment, and she couldn't execute one. No title passed under void judgment. No defendant, as C not administrator and B dead, when *sci. fa.* issued to revive. Defence: Husband can employ attorney for wife, original judgment sufficient, and administrator joined on *sci. fa.* only for regularity. C entitled, and presumed to be administrator.—Judgment for defendants affirmed. Attorney, as an officer of court, may appear for any competent person, and want of authority don't invalidate judgment. Wife entitled to service only for her separate estate, but husband may appoint attorney for her title, which he represents. B's death made her separate estate. C's interest established when original judgment is entered. A not entitled, as heir is unable to make any defence which she could not have made on *sci. fa.* Evans v. Meylert, 7 Harris 402, Pa. (1862).

Attorney can steal a client. In a joint suit A was returned '*nihil habet*,' and B 'served,' An attorney appeared for both, and Judgment was entered against them. A moved to set aside execution against him.—Refused. Appearance sufficient to support judgment. M'Cullough v. Guetner, 1 Binn. 214, Pa. (1807).

2. GIBSON, C.J.: "For a partnership debt, the entire property in the specific thing must be sold, even in a judgment against one of the partners; because through the medium of the execution, the law compels him to make the same application of the joint funds to the joint debts, that it was, undoubtedly, competent for him to make voluntarily. The sheriff levies and sells the entire property, because the partner defendant has no specific share that may be levied and sold separately; and even were that otherwise, yet, unless the sale should work a dissolution of the partnership *pro tanto*, the remainder would not be the property of the other partners individu-

"ally, but of the firm, and liable to execution by any other joint "creditor; so that the sheriff might as well go on and levy the whole "at once. Besides, as the other partners would be liable to contri-"bution, their remaining interest in the effects sold, being carried "into the partnership account, would entitle them to a credit exactly "equal to what should be necessary to reimburse the partner defend-"ant the loss of his individual share; so that the effect of selling a "part or the whole, would, as between the partners themselves, be "exactly the same, nothing being gained by the sale of an undi-"vided interest but the embarrassment incident to a joint ownership "by the purchaser and the firm." Taylor v. Henderson, 17 S. & R. 453, Pa. (1828.)

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§120.

A partner cannot submit a firm claim to arbitration.

On principle, the reason for denying to a partner the right to appear in an action, prevents him from submitting a claim for his co-partner to arbitration. The propriety of adjusting firm claims without litigation is obvious, and if the separate liability of the co-partner was not involved in the award, there would be no doubt about the right. In fact, unless a co-partner can defend his co-partner, he cannot sue for him. Bringing suit involves the risk of a counter-claim, which might turn the judgment against the plaintiffs, and charge their separate estates. As a partner can sue for a firm, unless the defendants object to the non-joinder of his co-partner, it would seem natural that a partner might also defend or submit for his co-partner. But the remedy is worked out in a different way. The submission or appearance binds the party, and also the firm assets, which he represents, but does not bind the co-partner's separate estate.[1]

Though a suit against a firm would require service upon all the partners, in order to make them parties to the action, and bind them by the judgment, a partner would seem to have the authority to enter an appearance for his co-partners, or in a State where arbitration enters into the system of procedure, to submit a controversy to arbitration. The proof, or liquidation of the claim by legal process, may be an incident of the business, and is within the province of a partner. This is recognized to its full extent in States where no execution can issue against the separate estate of a non-consenting partner under a judgment or award so obtained against the firm. As the reason which restrains a partner from prejudging a claim does not exist, he is empowered to settle the controversy himself, and to confess judgment for the amount against the firm.[1]

1. The leading case in Pennsylvania did not warrant any decision beyond this,[a] as the facts limited the decision to the firm assets. Even in the last case, although the opinion ignores the distinction and charges the partner by a judgment on a submission by a co-partner, the decision, in spite of the sweeping language, is limited to firm property.[b]

a. C. J. GIBSON'S dictum against submission by partner. 7 W. & S. 143.
Partner's admission binds him, and subjects the firm stock to execution. A, for A & Co., and B, for B & Co., submitted by parol the accounts between the firms to arbitrators, and made their award final, upon which execution might issue. They awarded $847.82 to plaintiffs, who issued a capias, and arrested B, and he gave bail, but his co-partners could not be found.—B's submission bound him, and enabled plaintiffs to take firm assets without a *distringas*, or *outlawry*, as in England, against non-served partners. Decision general, and based on partner's right to appear for co-partners. Taylor v. Coryell, 12 S. & R. 243, Pa. (1824).

b. Partner who buys out co-partner may submit to arbitration. B sold out to C, who assumed firm debts. He submitted A's claim to arbitration, and A sued B & C.—Recovered. Authority to submit inferred from B's sale of his interest. Becker v. Boon, 61 N. Y. 317 (1874.)
Partner implied authority to submit by parol. A sued B & C on a parol award made by arbitrators upon B's submission for the firm.

C denied B's authority, if they were partners, to submit the controversy to arbitration. The jury found a partnership.—Judgment for plaintiff. Partner has implied authority to make submission for co-partner. Gay v. Waltman, 8 N. 453, Pa. (1879).

Partner no implied authority to submit firm claim to arbitration. A & B sued D alleging breach of contract to co-operate in driving logs. D's defence: B submitted controversy to arbitrators, and awarded D.—Recovered. B no implied authority to submit claim to arbitration. Walker v. Bean, 34 Minn. 427 (1886).

Partner's submission of firm claim to arbitration does not bind co-partners, who may recover in spite of partner's bar as co-plaintiff. B, C & D, partners. Suits brought before and after dissolution and consolidated, and B against C's protest submitted the controvery to arbitration.—Award not binding upon C & D, who could recover on firm title, although B had disabled himself. 'Fanchon v. Bibb Furnace Co., 2 S. Rep'r 268, Ala. (1887).

2. *Judgment confessed by partner after dissolution, and a sale of firm stock to co-partner, subjects it to execution.* B & C dissolved partnership, B selling out to C, who indemnified him against firm debts. Two months afterwards B confessed judgment to A, and took C's separate property and the firm stock in execution. C moved to strike off judgment against him.—Rule alsolute. Judgment bound B, subjected assets, although transferred to C and no longer firm stock, to execution, with no less effect than if the judgment had been against both A & B. Mair v. Beck, 4 E. Rep'r 855, Pa. (1889).

Defect in partner's confessed judgment against firm cured by knowledge of subsequent lien-holder. B & C, partners. B confessed judgment in partnership name for firm debt to A, and subsequently confessed judgment in names of both partners to himself, as guardian for D. A postponed, because Judgment Index did not show who were his debtors.—Reversed, because D had knowledge of A's judgment. Actual equivalent to constructive notice. Hamilton's Appeal, 7 Out. 368, Pa. (1883).

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§121.

Each partner represents the firm in the transaction of its business and can bind his co-partner by an admission.

At the Common law a partner was disqualified by interest from testifying in reference to the partnership. If sued, he could not testify that another was his partner, because his testimony would charge the other with one-half the debt.[1] If the other was sued the partner might testify to his own membership, but

this would be an admissiou, not testimony.[2] If three contracted to buy merchandise, and the first sued the second for advances, the third would be an incompetent witness. He might admit his own membership, but his testimony that the second was also a member, would change the liability of the witness from a half into a third. The preliminary fact of partnership must be established before he is constituted a partner, and is vested with the power to bind his co-partner by an admission.[4]

When the disqualification of interest was removed by statute, an exception was made to the abrogation in reference to transactions which affected a deceased partner. In Pennsylvania the death of an individual excluded testimony against his estate in actions by or against executors, administrators, guardians or assignees.[5] The deceased partner was regarded by the Pennsylvania courts in interpreting the statute as an assignor, and upon his death his share devolved by operation of law upon his co-partner. The quota received by assignment of law disqualified the surviving partner, who, to the extent of the quota, represented the deceased partner. New York, on the contrary, repudiated, upon this point, the theory of separate titles in the partners. The surviving partner takes upon his co-partner's death the whole estate, not by devolution or assignment from his co-partner, but by virtue of the original joint title, which covers the entire firm property.[6]

Might the surviving partner in Pennsylvania testify to a contract made by him either before or after his co-partner died? An Act of Assembly[7] permits a "party," and an amendment[8] permits a "person," to

testify to anything occurring since the co-partner's death in an action by or against his representatives. The courts refused to let the plaintiff, in an action against the surviving partner, prove a contract made with the deceased partner, because the plaintiff would make out his own case, and the deceased could not reappear to contradict it.[9] If the transactions were with the partner who survived, but were performed before his co-partner died, the courts excluded the testimony.[10] But a subsequent act admits the testimony of a party to transactions between him and the surviving partner.[11] It might be a quibble whether a contract could be proved as made with a surviving partner. But it is not probable that the adverse party would be excluded, if the contract was made with the partner who survived, although made before the co-partner died. The reason for the enactment would control its interpretation.

If the contract was made with the partner who survived, but before his co-partner died, a third person, for example, a dormant or special partner, would be incompetent. The act of 1878 speaks of "parties to the record," and does not admit any other person to testify generally to transactions with the surviving partner. A co-partner, who is not sued with the partner defendant, is not, within the act which allows a partner to compel his adversary, or the adverse beneficiary of the suit to testify,[12] although the suit was on a firm contract. Where the bar of interest is removed between adverse parties on the record, one partner cannot testify in a suit against the firm for the plaintiff. He is not adverse to his co-partner, who would be charged by his testimony for half the debt.[13]

A recent statute has attempted to restate the provisions of the prior acts.[14]

1. Meason v. Kaine, § 10, n. 6.

2. Drennen v. House, *supra* § 69, n. 5.

3. *Supra* § 10, n. 6.

4. After the relation is established, any admission made by one partner, within the scope of the firm business, binds his co-partner.

Joint note made by one, charges makers only if partnership which gives him implied authority. A sued B, C & D, trading as B & Co., and offered in evidence a note of B & Co., in B's handwriting.—Incompetent until partnership proved, which would give B implied authority. Tellers v. Muir, Pen. 749, N. J. (1811).

Evidence of partnership makes partner's admission binding. A & E employed B, C & D as their attorneys, and A sued them as partners, for money collected. B and C neither denied nor admitted partnership, but did deny all other averments of the bill. D admitted partnership and employment. A put in evidence an assignment by E to his attorneys, B, C & D, of all his interest in the claim to be collected; and the complaint in the action to collect, which was signed B, C & D, attorneys.—Evidence competent to prove partnership and to make B's admission bind the firm. Fogerty v. Jordan, 2 Rob. 319, N. Y. (1864).

Court decides if evidence of joint interest sufficient to admit declarations of one against the other alleged partner. B and C owned a gold mine. A testified that B asked him if he had seen C, who, he told him, was at the hotel, and that B said, if you will sell lumber right we will take a good deal. A went to the hotel and made a contract with C for the lumber. The conversation with C admitted as evidence of partnership against B.—Competent. Hilton v. McDowell, 87 N. C. 364 (1882).

5. The disqualification of interest was abrogated with this proviso: "This Act shall not apply to actions by "or against executors, administrators or guardians, nor "where the assignor of the thing or contract in action "may be dead." Act 15 April, 1869, P. L. 30.

6. *Supra* § 100, n. 5.

7. "Where the assignor of the thing or contract in action "may be dead, no interest or policy of law shall exclude "any party to the record from testifying to the matters "occurring since the death of the person whose estate "through a legal representative is a party to the record." Act 9 April, 1870, P. L. 40.

8. Amendment substitutes "or person," for the first "party to the record." Act 11 May, 1881, P. L. 20.

9. *Plaintiff suing surviving partner cannot testify as to transactions between himself and deceased partner.* A brought assumpsit against

B, C & D, partners. On A's motion, the name of C was stricken from the record. After the cause was at issue B died. The jury were sworn as to D only, as surviving partner. At the trial, A was permitted to testify as to transactions between himself and B.—Error. But *quære* whether his testimony as to transactions between himself and D alone, would be competent. Hanna v. Wray, 27 Smith 27, Pa. (1874).

Surviving partner cannot testify as to contract of deceased partner with defendant. A, surviving partner of A & C, brought assumpsit against B. A testified as to the making of the contract, and the delivery of the goods, but admitted that the contract was not made in his presence.—B incompetent to show what was the verbal contract with C, but was, at least, competent to refute A's testimony. Gavit v. Supplee, 2 W. N. C. 561, Pa. (1876).

Plaintiff suing surviving, incompetent to prove contract made with deceased partner. A, a surviving partner, brought assumpsit against B, surviving partner in another firm, for putting case around organ in a church. Defence: That the order had been given by C, who had no connection with B's firm. A proved, by D, a contract made by deceased member of B's firm with deceased member of A's firm. B was offered as a witness to prove "that the defendant's firm never "ordered the case, which is the subject of the suit, and that the same "was not, in fact, delivered to them."—B incompetent. Stanbridge v. Catanach, 2 Norris 368, Pa. (1877).

10. *Plaintiff suing surviving partner incompetent to prove contract with partner, who survived, if made during co-partner's lifetime.* A sued the firm of B & Co., which consisted of B, active partner, and C, silent partner. Writ was served on both B and C. C died after the commencement of the action, and his death was suggested upon the record. At the trial, A's deposition was offered in evidence, especially to prove transactions between A & B. Objection: That under the Act of 1869, A was incompetent as a witness, for C was dead. Deposition admitted. But afterwards, *sur* rule for new trial.—New trial granted on the ground that to admit A's deposition was error. "Hanna "v. Wray, Gavit v. Supplee, and the more recent case of Stanbridge "v. Catanach, establish that a deceased partner is an assignor to his "surviving partner within the letter of the exceptions to the Act of "1869. It is true that this case differs from all those cited, because, "here, the evidence given was only of transactions between the sur-"viving partner and the plaintiff; and there, the evidence was as to "transactions between the deceased partner and the witnesses. It is "also true, that in both Hanna v. Wray and Gavit v. Supplee, the "Supeme Court intimates that the difference is material, but we do "not think that it is for us to depart from the principles announced. "In all the cases cited it is held that a deceased partner is an assignor, "and Hanna v. Wray decides that devolution of a deceased partner's "liability to a surviving defendant, is an assignment within the "meaning of the exception." Noble v. Mortimer, 4 W. N. C. 300, Pa. (1877).

11. In actions "brought by or against surviving partners, "no interest or policy of law shall exclude any party to "the record from testifying to matters having occurred "between the surviving partner and the adverse party on "the record." Act 25 May, 1878, P. L. 153.

12. *In suit against partner plaintiff cannot call co-partner, because not a party or adverse beneficiary of suit.* A *et al.* brought assumpsit against B, the executor of C, for a debt alleged to have been contracted by C, D & E, as partners. At the trial the deposition of D was offered in evidence by the plaintiff, *inter alia*, to prove the partnership.—In the Supreme Court, PAXSON, J., said: "The witness "(D) being incompetent on the ground of interest, he was not made "competent by the Act of 27 March, 1865, * * for the reason that "he is neither an adverse party on the record, nor a person for whose "immediate and adverse benefit such action was instituted, prose-"cuted or defended." Hogeboom's v. Gibbs, 7 Norris 235, Pa. (1879).

By the terms of the Act of 1865, above referred to, it is enacted: "That any party, in any civil action, or proceeding, whether at law, "or in equity, may compel any adverse party, or any person for "whose immediate and adverse benefit such action, or proceeding is "instituted, prosecuted or defended, to testify, as a witness in his "behalf, in the same manner, and subject to the same rules, as other "witnesses: *Provided, however,* That no party shall be allowed to "compel an answer to a bill of discovery, from an adverse party, and "also, to compel him to testify." Act of 27 March, P. L. 38.

13. *Partner an incompetent witness to prove firm liability, because of right to contribution.* B gave A his separate note for an alleged firm debt of B & C. A sued both, and called B to prove that note was given for firm debt. Objection by C: Act 1847 removes bar of interest only between parties adverse on the record.—Sustained. B's testimony would charge C for contribution, and B is not adverse to C on the record. Rich v. Hasson, 4 Sandf. 115, N. Y. (1850).

14. The disqualification of interest is not abrogated: "Nor where any "party to a contract in action is dead * or his right thereto or therein "has passed * by act of the law to a party on the record, who represents "his interest in the subject in controversy, shall any surviving or "remaining party to such * contract, or any other person whose in-"terest shall be adverse to the said right of such deceased * party be "a competent witness to any matter occurring before the death of "said party * unless the proceeding is by or against the surviving "or remaining partners * of such deceased * party, and the matter "occurred between such surviving or remaining partners * and the "other party on the record, or between such surviving or remaining "partners and the person having an interest adverse to them, in "which case any person may testify to such matters." Act 23 May, 1887, § 5, P. L. 158.

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§122.

A partner's confessed judgment will not bind his co-partner.

The judgment is restricted in its operation, so as to bind only the firm assets and the partner who confessed. The analogy was followed up of a jugment

where service was obtained upon one partner and not upon the others. The firm stock is sold under the judgment, and also the separate estate of the served or confessing partner.[1] The other partners may have the judgment against them stricken off the record, so that no execution can be issued against their separate estates.[2] They are not necessary as defendants in the judgment to enable the execution-creditor to take the firm assets.[3]

The joint or separate character of the judgment would be determined by the claim. If a partner's confession of judgment should intercept any inquiry, the court would, it can hardly be doubted, open the judgment upon the co-partner's application and let him prove that the plaintiff had no claim against the firm. Execution would be stayed in the meantime.[4] The execution would conform to the judgment, which is general, and, except by the special *fi. fa.* under the Pennsylvania Act of 1873, would make no distinction between a separate and a joint claim. Unless the character of the judgment was ascertained, it would be held to embody a debt against the partner as a representative, and the execution would seize the firm title vested in him and sell it.

The reason why New York and Louisiana permit a partner to confess a judgment against the firm is, that the judgment is confined by the laws of those States to the firm assets, and does not bind the co-partner's separate estate.[5]

A judgment confessed by a partner will not revive a lien barred by the statute of limitations. The partner, if a liquidating partner, can only continue an existing liability; he cannot create a new obligation.[6]

Evidence which tends to show that the judgment was confessed to defraud firm creditors puts the judgment-creditor upon proof of his *bona fides*. He must prove the consideration.[7]

1. *Confessed judgment by a partner authorizes sheriff to seize and sell firm stock.* D, of the firm of C & D, amicably confessed judgment against the firm, and in favor of E for $500, upon which execution issued, was placed in the hands of B, the sheriff, and was levied on the defendants' personal property. To relieve the property levied, D paid B the amount of the execution in notes of a bank, which about that time failed, and the notes became worthless. A rule was obtained by A, the assignee of E, to show cause why the judgment should not be opened and vacated as to C; and upon B to return his *fi. fa.* and bring the money into court. Judgment was set aside as to C; and B returned the facts as to the worthless notes. The court below instructed the jury to find for B.—On writ of error, reversed. B received the notes as cash, and must account for them as cash; but to whom? not to C, unless the money was made out of his separate estate, which does not appear. "A partner has power to dispose of the joint effects by his separate act; and that he may not "bind the firm by submission to arbitration, or confession of a judgment, is because it would bind the persons and separate estates of "the members, and thus transcend the limits of partnership authority. * * A judgment may be recovered against a less number than "all the members; if there be not a plea in abatement; and the "effects of the partnership may, consequently, be seized in execution of it." The judgment may be confessed. The New York practice restrains the execution, in a case like this, "to the joint "effects, and the separate estate of the partner personally bound; "and certainly the objects of the law may be lawfully attained by "it." In this case, it appears that the money was paid by the partner to release the partnership property. A is therefore entitled to recover his whole demand, for he is entitled to all that was not made from C's separate estate. Harper v. Fox, 7 W. & S. 142, Pa. (1844).

2. Bitzer v. Shunk, *supra* § 95, n. 2, *c*.

3. *Confessed judgment by a partner and execution under it constitute a lien prior to subsequent execution on judgment recovered against the firm.* C & D, partners, were indebted to B & Co., and C executed a bond in the name of C & D for the amount of the firm debt, to B & Co., with power of attorney to confess judgment. Judgment on this bond was accordingly entered against C & D; execution issued, and the sheriff sold the personal property of C & D, partners. In a distribution of the proceeds, A & Co., subsequent creditors, who had recovered judgment regularly against the firm, claimed the fund. About the same time the judgment of B & Co. was vacated as to D, on the ground that he had not authorized the confession. The auditor appointed to distribute the proceeds of the sheriff's sale, awarded priority to B & Co.'s execution, and his report was confirmed by the court below. A & Co. appealed.—Decree affirmed. "That one part"ner cannot confess a judgment against another partner, even for a "partnership debt, is a conceded legal principle, but it by no means "follows that an execution upon a judgment so given, levied upon

"the personal property of the firm, would be postponed at the in-"stance of a subsequent execution-creditor of the same firm. * * So "far as the judgment affects only the property of the firm it is good, "if obtained in the firm name, against any representative of the firm, "and there is no reason why it should not be, for the individual "partner has full power and authority to apply the property directly "to the payment of the debt. He may even assign the whole of the "partnership effects for a *bona fide* partnership purpose (6 W. & S. "301), and what he can do by his own act, he may cause to be done "by operation of law." The rule was not intended to prevent the "use, by an individual member, of the firm property, for partnership "purposes, but to prohibit partnership effects from being misapplied, "and also to protect the persons and separate estates of the partners "from being bound by acts not contemplated by the articles of co-"partnership." Grier v. Hood, 1 Casey 430, Pa. (1855).

4. *Execution against firm stock corresponds to judgment confessed by partner for firm claim.* A, the co-partner of B, gave C a judgment note for a debt of A & B, and C entered up judgment and levied on firm property. B claimed that execution should correspond to the judgment which A had confessed.—B could not prevent C from taking the firm stock in execution on his judgment against A. Ross v. Howell, 3 Norris 129, Pa. (1877).

5. *If not a lessee, partner not liable, after dissolution, for rent on a lease exceeding a year. Rescission of sale for non-payment of price, revests title in seller, subject to intervening judgment against buyer. Partner in commercial business has implied power to confess judgment.* A sold steamer to B & C, for $14,000, payable $1,500 down, and balance in instalments. B was captain, and C business manager. B, as captain, and for owners, confessed judgment, $5,700, for supplies furnished by D, who seized the boat in execution. C ratified the judgment. The next day A and B & C rescinded the sale, B & C returning the steamer, without reclaiming the advance, and A taking possession without a demand for the use of the boat. A claimed to set aside the execution, because title reverted to him clear of incumbrance. B's confession of judgment exceeded his power.—Execution enforced. A regained title, subject to the intervening judgment, by the confession which B, as partner in a commercial business, bound the firm without C's ratification of the judgment. Wilmont v. Ouachita Belle, 23 La. An. 607 (1880).

6. *Confession of judgment cannot revive a firm debt which is barred by the statute of limitations. It can only affect an existing claim.* B, a liquidating partner, confessed judgment in name of the firm in favor of A, the plaintiff in an amicable action.—The judgment did not operate as a release and discharge of C, B's co-partner, who refused to confess judgment, but he may be sued under the Act of 6th April, 1830 (*supra* § 82). But the confession of judgment cannot revive against the co-partner a debt which the statute of limitations has barred. B could only continue existing liability, he could not create a new obligation. Kauffman v. Fisher, 3 Grant 302, Pa. (1860).

7. *Creditors may impeach judgment confessed against the firm to defraud them.* B, C & D, partners. Firm made a note to B. He endorsed it to A, his brother, and induced C to join in confessing judgment against the firm for it to A. The parties knew that the firm was insolvent. A issued execution, and bought in the firm goods. E bought in and took possession of the same goods, under a subsequent execution against the firm. A brought trover against E. De-

fence: Offer of evidence that note had been paid, and of testimony by C, of conversations with B, admitting that the note was assigned and judgment confessed to defraud firm creditors. Evidence competent, and sufficient to put A to proof of a *bona fide* purchase. Davis v. Newkirk, 5 Denio 92, N. Y. (1847).

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§123.

The limit of a partner's authority to borrow is fixed by the amount which is usual in business of the class.

The lender must find out the business, and the normal extent of it, at his peril. If the jury should find that the loan exceeds that standard, the firm would not be liable for its repayment. If the sum is within the range of amount ordinarily raised by trades or business of the same kind, the fact that the partner appropriated the money to his own use does not relieve the firm from liability for it.

The power to borrow arises from trade, which consists of buying and selling. The firm capital may have been absorbed in the purchase of property which cannot be immediately resold. A partner must have authority to borrow the money required to preserve the firm property, and make it available for the firm business.

The power to pledge results from the power to borrow, when joined with the power to sell. The pledge is a composite transaction. It involves a dealing with the title to the property, and to that extent is derived from the power of sale. The title is not aliened for a price, but for a loan which must be repaid, and to that extent the validity of the transaction results from the power to borrow.

Chattel mortgage by partner of all the firm stock in payment of a firm debt valid. B & C took D into partnership. B & C mortgaged all firm property to E for debt. A obtained judgment against firm, garnisheed E, and denied that E was a creditor of new firm. D's evidence, that firm had dissolved before mortgage executed, rejected. —Judgment for E. Partner's mortgage of all firm property for some firm debts not an assignment for creditors in Iowa, and within partner's implied authority. So. White Lead Co. v. Haas, 33 N. W. 657, Iowa (1887). Re-hearing refused. 25 N. W. 493, Iowa (1887).

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§124.

A partner may make, draw, accept or endorse commercial paper

He may accept a draft on the firm in his individual name, and his acceptance will be for the firm upon which the draft is drawn.[1] A partner cannot be prevented from binding the firm by commercial paper. Any restriction would be unavailing, as commercial paper is an incident to the business.[2] A partner could bind his firm in advance by a promise to give commercial paper. A reliance upon the promise would charge the firm, especially if such a promise had been made before, and had been fulfilled.[3] Partners in different firms can exchange accommodation paper. They can in this way raise money apparently upon a transaction between two firms, although, in fact, the transaction is a fiction.[4]

If a partner induced the plaintiff to indorse his note by the assurance that it was for the firm, and his co-partner endorsed it, the plaintiff could recover from the firm. Although in form an individual transaction of the separate partners, the loan was made to the firm, and the action was not on the note, but for money paid to the firm's use.[5] A partner's note may be shown at the trial to be for a loan to the firm. The

presumption that the note embodied an individual transaction may be rebutted, and the firm charged. If the loan was made to the firm, the individual note would not be satisfaction, unless accepted as such.[6]

1. *Partner's individual acceptance of a draft on the firm binds it.* A & B, who sold goods to C & D, drew on them for the price. D, in his individual name, accepted the draft, which the bank discounted. A & B, who were compelled to take up the draft, sued C & D on it.—Recovered. Tolman v. Hanrahan, 44 Wis. 133 (1878).

2. *Partner may bind firm by making notes in its name.* B & Co., in the shoe trade, at Boston, formed a partnership with C & D, at Binghampton, to conduct a tannery there, and sell the leather in Boston, and agreed not to contract debts, except by mutual consent. B & Co. made notes in the name of the aggregate firm, payable to B & Co., and endorsed them to A, who brought suit upon them.—Recovered. Nothing on the paper to put A upon enquiry. Blodgett v. Weed, 119 Mass. 215 (1875).

3. *Managing partner may bind his co-partner by promising his signature to renewal of firm note.* B, managing partner, to effect a loan, induced A to endorse a note signed by B, by representing that it was on firm account, and would be signed by his partner, C. C did sign the note, but not the renewals, which were endorsed on the same representation. A sued B & C. C's defence: Renewal payment in law, of original note, and A surety for B, and not for B & C.—Recovered. A, who was entitled to rely on B's representation, did not relinquish firm liability. McKee v. Hamilton, 33 Ohio St. 7 (1877).

4. *'Kiting' by partner valid if for firm benefit.* B, for B, C & D, exchanged commercial paper with E, in order to raise money for firm. B drew on B, C & D in favor of E, who endorsed draft to A. They accepted it in return for E's acceptance. A sued B, C & D. A's claim: *Bona fide* holder for value; exchange for mutual accommodation, and within partner's implied authority. Denied, and the paper a fraud on C and D, unless they assented to it. They did not use E's acceptance.—Recovered. Exchange, if for firm benefit, binding. Gano v. Samuel, 14 Ohio 593 (1846).

5. *Accommodation endorser may recover from the firm on a note made by partner and endorsed by co-partner after the plaintiff's endorsement, by showing that plaintiff endorsed for the firm.* B & C, partners. C made a note to A, and induced him to endorse it, by telling him that it was for the firm and would be endorsed by B. It was endorsed by B, and discounted by bank, which recovered from A. He sued B & C. B defaulted, and C objected to any evidence to charge the firm.—Admitted. Action not on the note, but for money paid to firm's use. A endorsed for defendants' accommodation, and at their request. They received the proceeds, which were used in the firm business. Thayer v. Smith, 116 Mass. 363 (1874).

6. *Taking partner's individual note does not exclude evidence that the loan was made to the firm.* A sued B, surviving partner of C, and averred that C borrowed $1,500 for the firm, and gave his individual note for the loan. B demurred.—Recovered. The note, though evidence of a loan to C, as an individual, is not conclusive.

and might be rebutted at the trial. The note would not be substituted for the firm debt, unless accepted in satisfaction of it. Hoeflinger v. Wells, 47 Wis. 628 (1879).

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§125.

A partner cannot make accommodation paper in the firm name, either for his own use or for the use of a third person.

That is, any one taking such paper with a knowledge of its character, would be precluded from recovering.[1] The endorser of an individual note for the accommodation of the firm, could not retain the pledge subsequently received for his endorsement. The note disclosed an individual transaction, and the endorser has no claim on the firm.[2] The offer of an individual note with the assertion that the paper was for a firm transaction and the change to a firm note at the party's request, might be notice of an individual matter. If the partner had represented in the first application that he wanted to negotiate the note for his individual account, and then had changed the paper to a firm note, with a corresponding change in the representation, the party who was asked to endorse would be sufficiently notified.[3] If a partner offers a third person's note with the firm's endorsement, in consequence of a demand for security for a personal loan, the taker could not hold the firm. The transaction would disclose an accommodation by the firm, and that would exceed the partner's authority.[4]

Aside from the form of commercial paper, anything that discloses a transaction for the individual account of the partner would be sufficient to put a taker on

inquiry, because the partner has authority to negotiate commercial paper only for the firm account. Either formal notice or facts from which a court and jury would infer an individual transaction would be sufficient.[5]

If firm notes are fraudulently negotiated, a party to the fraud cannot be compelled to pay and recall them. The holder has a legal right to recover on the notes, and the firm's remedy against the fraudulent negotiator at law is adequate.[6]

1. *Partner cannot give accommodation endorsement. No separate judgment in joint action.* B gave A & Co. his note, with B & Co.'s endorsement. A & Co. knew that the endorsement had been made by B, as an accommodation. A & Co. sued B & Co.—Non-suited. Without proof of B's authority, no joint contract. Separate judgment against B impossible at Common law in a joint action. Fielden v. Lahens, 9 Bosw. 436, N. Y. (1862).

2. *Form of commercial paper is notice to accommodation endorser.* B applied to D for accommodation endorsement for his firm of B & C. D, without examining the paper, endorsed B's individual note. B delivered to D a canal boat belonging to firm, as security. B had note discounted, and D was compelled to take it up. A obtained judgment against the firm, and took canal boat in execution. A bought boat at constable's sale, and brought replevin against D's vendee.—Recovered. D was not a firm creditor, but took the firm boat for an individual partner's debt. D could not assert that his endorsement was for the firm, inasmuch as he was bound to read the note before he endorsed it. Uhler v. Browning. 4 Dutch 79, N. J. (1859).

3. *Substitution of firm, for individual, note at endorser's request not notice of individual transaction if partner represented that he negotiated for the firm.* D, of the firm C & D, informed A of a contemplated change in the firm, "and that he might want a favor" of him. C, subsequently, retired, and E became D's partner. D afterwards called on A, and asked him to endorse two notes drawn by himself individually. On inquiry, A was told that the notes were for C, for the balance of the stock; that the new firm, D & E, had bought the goods; and that the only reason the notes were in D's name was, that he did not know it would make any difference in the security of the endorser. A was satisfied that the firm D & E was solvent, and thereupon, at his suggestion, new notes were drawn by D, in the name of the firm D & E, and endorsed to A. D used the notes for his own purposes, and not for the benefit of the firm, which became bankrupt, and assigned to B. A, who had been obliged to take up the notes, proved his claims before the Register, but the Court below rejected them on the ground that A was not a *bona fide* holder without notice of facts affecting their validity.—Reversed, and claims allowed. A's only knowledge of the transaction came from the representations of

D, that the transaction was strictly pertinent to the partnership business, and, therefore, within the scope of either partner's power. "There must be knowledge of facts impeaching the validity of the notes." There was no such knowledge on the part of A. "The "notes having been drawn by one partner, in the firm name, apparently in the course of partnership dealing, and without notice of "facts from which the appellant was bound to infer that they were "made without authority, or that a misapplication of them was con-"templated, he is a *bona fide* holder of them, and is entitled to their "allowance as debts against the bankrupt partnership." Bush v. Crawford, 29 Leg. Int. 363 (1872).

4. *Firm endorsement given by a partner for a loan on his individual account is notice to the taker.* B applied to A for an advance on cotton to be shipped by D. A asked for security, and B brought D's note to B & C's order, and endorsed their name.—No recovery against C. Notice to lender that partner pledged the firm credit for a transaction foreign to the firm business. Newman v. Richardson, 9 Fed. Reporter 865 (1881).

5. *Partner's denial that a renewal note was made for a firm debt, or by his authority, puts plaintiff to proof of both facts.* A sued B, D & E for note of $4,673. E pleaded *non est factum*, and alleged: That A sold cotton to B, C & Co., succeeded by B & D, who gave a note for the price to A. D renewed the note, in the name of B, D & E, in anticipation of its formation. D renewed the note again, in the name of the partnership, B, D & E, after it was formed. A knew, when the notes were renewed that B & D were insolvent, and that E was solvent.—Judgment for E. E's averment put A to the proof of D's authority to bind E by the note. Bryan v. Tooke, 60 Ga. 437 (1878).

6. *Equity will compel collusive holder of firm note made by partner, to cancel it, but not to pay it in the hands of bona fide purchaser, though liable to indemnify firm.* B fraudulently made and delivered three firm notes to C, who knew of the fraud. C endorsed one of the notes to D, a *bona fide* purchaser. Firm dissolved, and a receiver appointed. D brought suit against the firm on his note. A, B's partner, brought bills against B & C, to compel C to cancel the note held by D.—C compelled to cancel his note, but not to pay the note of D, who had an absolute right at law, against A & B. A's remedy at law was adequate to recover from B & C after he had paid D's note. Fuller v. Percival, 126 Mass. 381 (1879).

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§126.

The authority of a partner to bind the firm by commercial paper is defined not by the principles of partnership, but by the principles peculiar to commercial paper.

A partner's authority to make commercial paper in the firm name is limited to transactions between the firm and third persons. He never represents the firm except in dealing with third persons. A partner may advance money to his firm in excess of his contribution, and take the firm note in acknowledgment, or the firm may permit the partner to use their credit as accommodation endorsers in an individual transaction.[1] But, properly speaking, neither of these transactions form part of the firm business. They are strictly between the partners dealing with each other as separate individuals. In neither case, therefore, can the partner have any implied authority to sign the firm name. On partnership principles, therefore, whenever a note in the firm name is made payable to a partner, the taker would be charged with notice of the partner's want of authority to sign the firm name. On the other hand, if the note of an individual partner is made payable to the firm and endorsed in the firm name, the taker from the individual partner is notified that the endorsement is for the accommodation of the individual maker. The endorsement can have no other effect, because a partner has no reserve credit to pledge for the firm.[2] Such a note might cover a withdrawal by the maker of a part of his contribution, but then the co-partners would be the proper custodians of the paper, and the maker would have no right to endorse it for the firm. The result is that upon partnership principles in all such cases the form of commercial paper should put the taker and any subsequent holder upon enquiry as to the authority of the partner to attach the firm signature.[3] But in this respect the doctrines of partnership have been

modified by the rules which govern commercial paper. Commercial paper is habitually drawn in so many different forms and so seldom corresponds in form to the real nature of the transaction that the courts disregard the form altogether.[4] A partner by means of commercial paper may, therefore, do all that the firm itself could do, and there is no limit to his authority.[5] In absence of actual notice that the transaction is for his individual benefit, his putting the firm signature to comercial paper creates in all cases a firm liability.[6] The interjecton of this doctrine into the law of partnership operates as a practical extension of the partner's implied authority.

The partner, as such, has no authority to make use of the common name, except for a common purpose. This rule gives him the firm name for his private use, and in effect, makes each partner an agent for his co-partners, not only in the partnership, but in all transactions. There is no limit to a partner's authority to bind his co-partners, by making, or endorsing, commercial paper. Though the firm name has been misused by a partner, he, nevertheless, had the right to use it; and while the misuse of the name prevents a recovery from the firm by a holder, who took the paper with notice and without the concurrence of all the partners, its negotiation afterwards, if for value and without notice, is not affected by the original want of authority. The act was within the power of all the partners, and though the exertion of this joint power by a single partner was sufficient to invalidate the paper in the hands of one, who knew the circumstances and dealt with any number of partners less than the whole, the validity of the paper is not

affected in the hands of a *bona fide* purchaser, who relied upon the paper as a due exercise of its power by the firm.[6]

1. The use of firm credit, without authority, has the same effect.

Partner's endorsement in firm name for his separate debt makes him liable to reimburse co-partner who pays his quota to get a settlement, and thereby release his separate estate from firm executions. A & B were partners. B endorsed C's note, but afterwards substituted A & B's endorsement without A's knowledge or consent. A's property being under execution for a firm debt, B refused to settle with creditors unless A paid his one-half of the note, and released B from all liability on account of it. A paid one-half and brought bill to recover it from B.—Recovered. B's endorsement for firm exceeded his right as a partner, and bound B to indemnify A for the payment of B's debt. B's refusal to get A's separate estate released from the joint execution by means of a settlement with the creditors, unless he would assume B's debt, was putting pressure upon A, and made his payment a matter of compulsion. Smith v. Loring, 2 Ohio 440 (1825).

2. *Acceptance by partner in individual name for firm, does not create a separate debt.* B & C, partners. D drew on firm for price of merchandise, and B accepted thus: B & Co, B. After B's death, bill was endorsed to A, who claimed administration upon B's estate as a creditor. B died insolvent.—Dismissed. A not a separate, but a firm creditor. In re Barnard, 32 Ch. D. 44 (1886).

3. But the form of an individual transaction would be overcome, at any rate, so that the *bona fide* holder could charge the firm upon the paper in spite of its form. If the form was notice, it would affect everybody who took the paper, not only the taker, but the holder for value. The form would not be exhausted by a single operation, but would continue to act upon all who took the paper.

Common partner drawing firm note to his order, and endorsing it with his name and with name of second firm, indicates a firm transaction. B, of the firms B & C and B, C & Co., drew a promissory note payable to his own order, signed the firm name B & C, and endorsed it with his own name, and with the name of the firm B, C & Co. A became the holder of the note, which was at its maturity protested for non-payment, and sued B, C & Co. as endorsers.—Recovered. Ihmsen v. Negley, 1 Casey 297, Pa. (1855).

4. *No form of commercial paper by partner notice of individual transaction. Actual notice must be given of dissolution to customers of the firm.* B made note to his own order, and after endorsing it, obtained C's endorsement. When B took the note to bank, A, for discount, he said it was made on account of firm B & D, and A required the firm endorsement, which B made. The firm had dissolved, and published notice, but A had not actual knowledge. A, who had previously discounted notes for the firm, sued D. Defence: Form of paper *prima facie* an individual transaction, and consent of all part-

ners must be proved.—Recovered. Actual notice of dissolution to A necessary Form of paper no notice. Bank of Commonwealth v. Mudgett, 44 N. Y. 514 (1871).

5. *Partner's accommodation endorsement charges firm.* B & C, partners. A held two firm notes, each of $5,000. C gave firm notes in exchange for D's notes, which C endorsed to A, in order to take up the original notes. A sued B & C on endorsement.—Judgment for A. Mutual accommodation might be for firm benefit. Steuben Co. Bank v. Alberger, 101 N. Y. 202 (1886).

6. *Firm note in hands of a partner, even though endorsed by a stranger, is prima facie a firm asset.* B made a note in name of B & C, payable to D, and induced him to give an accommodation endorsement. B gave the note to A, in payment of an individual debt. A sued firm, and obtained judgment by default. C got judgment opened, to let him into a defence.—Judgment entered for C. Form of paper, and B having possession of it, raised presumption that note was a firm asset, and should put A on enquiry. He could recover only by proof that note had been negotiated by endorser in the market. Then the presumption that B held it as a firm asset would be rebutted. Mecutchen v. Kennady, 3 Dutch. 230, N. J. (1858).

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§127.

The form of commercial paper, unconnected with other circumstances, conveys no notice to the first or subsequent takers of the nature of the transaction, or of the purpose for which the partner has executed it.

The note of a partner to the firm indicates, apparently, his debt to the firm, and when he places upon it the firm endorsement, there may be ground for supposing that his object is his own accommodation. On the other hand, a note of the firm to the partner, when endorsed by him, apparently indicates an attempt on his part to use their credit for his private advantage. But these indications are not conclusive. In both cases, he may be using his name for their benefit. Commercial paper may be drawn in various ways for the accomplishment of the same purpose. A partner

has a right to raise money for the firm by giving its name as maker or as endorser, and no one can say that his object is illegitimate when he adopts any one of the various forms sanctioned by the custom of business.[1] The form of commercial paper frequently does not express the actual transaction between the parties to it.[2] The only things that are fixed and certain are the obligations of the makers and endorsers to the holder for value.

A partner's individual note, with the firm endorsement, made by a co-partner, and the blanks filled out by the partner when he negotiated it to the plaintiff, was no notice that the partner was the principal debtor. If the note was merely a blank form with the firm signature by a partner, the taker would recover, although he had knowledge that it was filled out by a partner in a different firm and negotiated by him. No notice would avail to relieve the firm if a partner used its name on commercial paper.[3]

In the hands of a subsequent holder without notice, the paper of a partnership, whatever its form, is good, but there may be circumstances in the case which sufficiently inform the first taker that the paper is not given for a partnership purpose, as if, for example, the partner should give a firm note, or his own note with the firm endorsement, to pay his individual debt. It has been held in Pennsylvania that if the partner makes a note payable to a stranger, who endorses it, and then the partner's firm endorses it, the taker from the partner sees that the endorsement by the stranger is an accommodation, and he should infer that the firm endorsement was given for the benefit of the individual partner.[4]

But it is questionable whether this circumstance should be given the effect indicated. The stranger may as reasonably be supposed to be an accommodation endorser for the firm as for the partner. Where a man brings to bank for discount his own note, regularly endorsed by the payee, it is clear the irregular endorsement was for the maker's accommodation, but when a partner is the maker and his firm the endorser, the partner represents both himself and his firm, and who shall say in what capacity he has the note discounted. A partner may make a firm note payable to himself and endorse to and for a second firm, of which he is also a member, without raising any suspicion that he is using the second firm's endorsement for his individual advantage. He can both make and endorse firm paper, and the intermediate link of making the note payable to himself and endorsing it over to the second firm, is simply expressing his agency, and is no more than making the note payable to the second firm in the first instance.[5]

Where neither the firm nor the partner is the primary debtor, but a stranger is, and the firm's liability on the paper is prior to the partner's, the form indicates a partnership transaction. The firm drew on a stranger, who accepted the draft, which was payable to the partner and endorsed by him. The taker held the firm.[6] A partner's individual note to his firm, endorsed by it and also by second firm, was sold by a broker for the first firm. The buyer recovered from the second firm.[7]

1. *Firm bound by custom of keeping bank account and giving checks in one partner's name. No fraud for this partner to give co-partner a blank firm check.* B, C & D, partners, kept bank account and drew checks in B's name, but did other business in name of B & C. B

signed a blank check in favor of D, who filled in the amount and endorsed to A, as a firm check, and for a firm debt. After dissolution, A sued the three. C's defence: Blank check a fraud on the firm. Check in B's name presumably on his credit.—Credit upon which check received a question of fact, and delivering blank check to partner no fraud on the firm. Crocker v. Colwell, 46 N. Y. 212 (1871).

Partner's individual note, endorsed by firm and negotiated by him, not notice to taker of an individual transaction. B made his individual note payable to his firm, C, D & Co., and C endorsed for the firm. The date and rate of interest were left blank, and filled up in A's presence by B, when he negotiated the note to A. In a suit by A, B made default, and D, the surviving partner, requested the court to charge that the form of the note and the circumstances of its negotiation by B were notice to A of an accommodation endorsement.—Refusal sustained. Partner's authority to make firm paper, includes the right to insert the date and rate of interest. Making the note in his individual name might be for the firm, and not for his individual benefit. Wait v. Thayer, 118 Mass. 473 (1875).

2. The forms which would give notice, if not prevented by more important considerations, of an individual transaction for the partner's benefit, are three. First: If a note is made by a partner in favor of the firm, and endorsed by the firm, the taker should know that the endorsement is for the maker's accommodation, and beyond any partner's authority. Second: If the partner makes a note payable to a stranger, who endorses it, and then the partner's firm endorses it, the taker might see an accommodation endorsement by the firm of a partner's individual debt.[a] Third: An irregular endorsement, which is construed as an accommodation, because not made in the regular course of negotiation. The firm endorsement made by a partner before the payee had endorsed, should not charge the firm, if the principles of partnership governed the matter, because the paper did not come regularly to the firm by the payee's endorsement; but as the firm's endorsement means something, it would be an accommodation.[b]

a. *Infra* Tanner v. Hall.

b. *Partner drawing bill to his own order, endorsed by firm and then by drawer, would be notice of an accommodation.* B drew on E & F for $400. C endorsed the bill in the name of his firm, B, C & Co. D added his own endorsement, took the bill to the agents of the bank, A, who discounted it, and paid D the proceeds. At maturity, the bill was presented to E & F, and as they had no funds, was protested; and notice given to the endorsers. A then sued B, C & Co.—B, C & Co. not liable. LOWRIE, C. J.,: "The very form of this bill is "*prima facie* evidence that [B, C & Co.] are accommodation en-"dorsers for [D]. * * The law does not presume that one partner "is agent for his co-partners to endorse as surety for others, or out-

"side the sphere of ordinary mercantile partnerships." Bowman v. The Cecil Bank, 3 Grant 33, Pa. (1859).

3. *The firm signature to blank form of draft, no notice of accommodation.* B signed a blank form of draft in the name of B & C, and delivered it to D, who, in the presence of A, filled in the amount, payable to his own order, the name of his firm as drawee, and accepted for his firm. B & C had dissolved, but A, who did not know it, discounted the draft, and sued C. Defence: Draft in hands of D, one of acceptors, notice of accommodation by B & C. The blank form was notice of no consideration to the firm of B & C.—Judgment for A. Possession of the form by D was sufficient evidence of his authority to fill it up, as agent appointed by B for the firm of B & C.

4. The form of commercial paper would, but for the superceding of partnership principles by the law of commercial paper, show who were principals and who were accommodation parties, and give notice to the holder of its character. As a partner has no right to use the firm credit for his separate advantage, if he does appropriate the asset, he exceeds his authority, and would not on partnership principles charge his co-partners. When the commercial paper shows that the partner is the primary debtor, and the firm only his surety, the taker would be apprized by the form, if given its legitimate effect, that he was conniving with the partner who is using the firm name for his individual benefit, in order to defraud his co-partners.[a]

a. *Partner's note to stranger, and after stranger's endorsement, firm endorsement by partner, who got it discounted, sufficient notice to put taker on inquiry.* B, of the firm of B & C, drew his separate promissory note in favor of D, E & Co., procured their endorsement of it, added the endorsement of his own firm, and had it discounted by a bank, F, which sent it to another bank, G, for collection, having placed the proceeds to his separate account. The note being returned, was endorsed to A by the President of the bank F, and A sued B & C on the note.—Judgment for B & C. A partner has authority to bind his firm by acts within the scope of its business, but by no other acts without the express or implied sanction of his co-partners. Where such authority is express, there can be no difficulty; to deduce it from circumstances is less easy. A partner cannot pay his separate debt with joint funds, though the creditors may not suspect a misapplication. "The case may be different where partnership paper is "paid or pledged for a debt incurred, on the faith of it, by a partner "or a stranger. If it pass into the hands of a *bona fide* holder for "value, or be paid to the vendor of an article dealt in by the firm, "the debt will be treated as if it had been incurred by the partner-"ship. The difficulty is, to determine * * between *bona fides* and "*mala fides*. The latter may certainly be imputed to a holder who "omits to inquire into the true nature of a transaction which does "not fall in with the current of trade. * * The endorsement of ac-"commodation paper, is not the ordinary business of a partnership; "nor is it a necessary or legitimate incident of it;" although, if

such has been the custom of the firm, the custom may give authority to the partners to continue it. It was not this firm's custom. The fact that B "had drawn ostensibly for his separate accommodation, "sufficiently indicated that his firm's endorsement was also for his "separate accommodation, and made it the duty of the bank to in-"quire into his authority for the act, as it would have been bound to "do had he endorsed the name of the firm on the note of a stranger." Both the bank and A were affected with notice that the transaction was a separate one. Tanner v. Hall, 1 Barr 417, Pa. (1845).

5. *Common partner's drawing note in name and to order of one firm, and endorsing it in name of both, indicate a firm transaction.* C, a partner in the firms of B & C and C & D, drew a promissory note in the name, and to the order of B & C, and endorsed it with the names of both firms. A discounted the note for C & D, and placed the proceeds to their credit. C drew out the money and used it. A sued B & C on the note.—Recovered. Miller v. Consolidation Bank, 12 Wright 514, Pa. (1865).

6. *Draft by firm to partner's order, and endorsed by him, indicates, by its form, a partnership transaction.* B, of the firm of B & C, made a draft to his own order in the name of the firm, and endorsed it with his own name. The draft was accepted by the parties on whom it was drawn, was discounted by A, and the proceeds paid to B. It was protested at maturity for non-payment, and A sued B & C.—Recovered. Haldeman v. Bank of Middletown, 4 Casey 440, Pa. (1857).

7. *Individual note drawn by common partner to one firm, and endorsed by it and by second firm, not interpreted by its form.* D, a partner in the firms of B & Co. and C & Co., made, in his own name, a note to the order of C & Co., endorsed it with the names of both firms, and placed it in the hands of E, a note-broker, to negotiate for C & Co. E sold it to A, who made no inquiries concerning it, and at its maturity sued B & Co.—Recovered. Moorehead v. Gilmore, 27 Smith 118, Pa. (1874).

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§128.

The fact that the firm received the consideration will not change the character of an individual transaction.

If a note made by an individual partner was not alleged to be for the firm, but the loan was applied to the firm business, the endorser could not recover from the firm. He had notice of an individual transaction, and no cause of action exists against the firm.[1] A member of two firms who made to his co-partner a

note of the other firm for an individual debt, did not charge them, although by not paying the debt, the money belonging to the creditor was used in the second firm's business, because the co-partner knew his partner was the debtor, and if the second firm used the money which should have been paid, it was an advance made by the debtor and not by the creditor.[2] If one partner makes and another endorses a note, the application of the proceeds will not charge the firm on the note. The original contract was not made by the firm, and the subsequent alteration cannot alter the contract.[3]

If the partner does not represent that he is borrowing money for the firm, and gives the lender his individual note for the loan, the note embodies the transaction, and the lender has no recourse except against the maker, unless it clearly appears that the loan was made to the firm, and that the note was collateral.

1. *Surety on note made by partner in individual name no claim against firm.* A endorsed notes made in B, managing partner's name, on his representation that they were for B & C. B applied the proceeds to firm business. A proved B's insolvency, and claimed judgment against C.—No cause of action. Form of note showed an individual transaction. Peterson v. Roach, 32 Ohio St. 374 (1877).

This decision applies the principles of partnership, instead of commercial paper, and makes the form notice of an individual transaction, in spite of the representation made at the time that the note was negotiated on behalf of the firm. The representation supercedes notice implied by the form.

Partner's note binds firm if made for its business. B procured D's endorsement of B & C's paper for firm, but bank preferred to discount B's paper with D's endorsement. Upon insolvency, B assigned certain firm claims to secure D, but C assigned all the firm claims to A.—D entitled. Endorsement for firm though note individual, and B could pay it with firm assets. Hopkins v. Thomas, 28 N. W. Rep'r 147, Mich. (1881).

2. *Partner taking note of different firm from common member for his separate debt, cannot charge the firm.* A & B, contractors and partners. A & C, manufacturers and partners. A gave B a note of A & C, for a loan to A individually.—Though he used it in the firm of A

& C, they would not be liable without consent. Would become debt of firm to A, not to B. Clay v. Cottrell, 6 Harris 408, Pa. (1852).

3. *Partner's note a separate contract, unchanged by application of proceeds to the firm.* B, C, D & E were partners in conducting a flour mill. B made, and C endorsed a note to F, who endorsed it for value to A. B applied the proceeds to payment of firm debts. B & C were both indebted to the firm for arrears of contribution. A sued. D & E defended.—Judgment for D & E. Money *bona fide* lent on credit of maker and endorser. Subsequent application does not alter original contract. The indebtedness of B & C to the firm only explain their giving the note. National Bank of Salem v. Thomas, 47 N. Y. 15 (1871).

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§129.

A partner cannot guarantee the debt of a third person, unless such a guaranty is an incident to the business of the firm.

A partner cannot guarantee, on behalf of his firm, the liability of a third person.[1] A single partner could assign a firm mortgage. The assignment, as an executed contract, discharged a firm debt, and the seal was surplusage.[2] He can assign a firm judgment. It is an asset which any partner might sell. But he could not guarantee payment of the judgment, not even if the guaranty was necessary for its negotiation. The necessity is a reason for securing the concurrence of all the partners, not for dispensing with it. A judgment, though assigned and guaranteed by a partner for value, does not entitle the buyer to sue the firm upon the guaranty. The partner who gave the guaranty is individually bound, without proof that it was made on his separate account, because beyond his power as a partner. The guarantee is void, though the assignment would be valid.[3]

If a note were given, not by the immediate debtor, but by the debtor's debtor, might the creditor take it

without inquiry and assume that the firm received the consideration? Or may a partner give firm paper for a co-partner's debt? It would be easy for the partners to exchange the firm paper for their individual debts, and thus charge each other's debts upon the firm without directly giving the firm obligation for their own debts. The debts of its members might compel it to assume them in order to save itself; or the firm might be broken up before it started, as the creditor would have it in his power to put the assets in the hands of a receiver. The exigency would be overwhelming; still the necessity does not establish a partner's right to undertake the payment of a debt foreign to the firm. Unless the debt can be brought within the range of partnership business, the individual partner has no implied authority to assume it. The guaranty of a judgment, though necessary to enable the firm to sell it, did not authorize a partner to guarantee the payment.[4] If the authority arises out of the business undertaken by the firm, there is no limit to the extent to which a partner may charge the firm. The assumption of a debt might be out of all proportion to the profits expected from the firm business, and the co-partner should at least have the option to say whether he preferred to renounce the business, or to run it subject to additional liabilities imposed upon it from without, and not the result of the business transactions themselves. The extent of the business may be elastic, according to the partner's discretion, and the liabilities will correspond to the grant of power, and also be vague and indefinite; yet they will grow directly out of the nature of the business, and not be a burden cast or shifted upon it

from a different business. Such a load should be left to the firm's election. If they prefer to shoulder the debt and stagger under it, rather than relinquish the objects of the firm, they must concur in assuming the indebtedness. The alternative of abandoning the business, rather than be charged with antecedent or foreign liabilities is at least always open to the partners.[5]

1. *Partner's guaranty, though in firm name, binds him, but not the firm.* A & B hesitated to sell merchandise to C, when D, in the name of D & E, guaranteed payment. Exception to charge: That D could pledge the firm credit without E's knowledge.—Judgment for plaintiffs reversed. Partner's acts beyond the scope of firm business, are presumed to be on his individual account, though done in the firm name. Sutton v. Irwine, 12 S. & R. 13, Pa. (1824).

Partner's endorsement to pay creditors of old firm not binding. B, of the firm B, C & D, endorsed in the name of the firm, a note to pay A a debt of the former firm B, E & Co., of which C was not a member. A brought suit.—C not liable. The court below affirmed one of the defendant's points, to the effect that in the absence of evidence that the endorsement was made with the authority and assent of C, A could not recover against him. The court above approved the answer, and added: "The plaintiffs took the note in payment of the "old debt of the former firm, and therefore knew that [B] was acting "without implied authority of C as a partner in the new firm, and "there is no evidence of his assent to [B's] act." Riegle v. Irwin, 34 Leg. Int. 447, Pa. (1877).

Partner may create, but not assume, a liability. Inconsistent defences are good as alternatives, though one is inconsistent with plaintiff's claim. A & B sued F, to recover payment of a note made by C for firm A, B & C to his own order, and endorsed to F, which F endorsed to a *bona fide* holder, and plaintiffs paid. Claim: C gave note to F, for debt of a different firm, without plaintiff's consent. Defences: 1, Horse bought for C's prior firm, whose assets A, B & C purchased as successors; also, C's representation that debt was assumed by his second firm, which took the horse and used it in the business. 2, Also, horse bought by C for A, B & C, and their note given for the price. Defences excluded.—Reversed. Defendant entitled to prove the 2d defence. Kaiser v. Fendrick, 2 Outerbridge 528, Pa. (1881).

Nor does a guaranty to a partner enure to the firm.

Guaranty to partner does not enure to firm. B, under contract, in his own name, furnished firm goods to C, and D guaranteed payment to B. Firm A & B sued D on his guaranty.—Judgment for D. Though C might be liable for the price to A & B, D bound only by his contract. Not liable to A, because contract with B; not liable to B, because goods furnished by A & B. Barnes v. Barrow, 61 N. Y. 39 (1874).

2. *Supra* § 117, n. 1.

3. *Partner cannot guarantee payment of judgment which he assigns.* B & C, partners, recovered judgment against D. B, for value, and in the name of the firm, assigned the judgment to A, and guaranteed its payment. A tried to recover the money on the judgment, but D was unable to pay. A then sued B & C. Defence: No authority shown by C to B to execute the guaranty, which was not in the course of partnership business. In the court below, judgment for defendants.—On writ of error, affirmed. SMITH, J.: "The true criterion, "whether the act of one partner makes the other responsible, seems "to be, whether the act was or was not done according to the usual "course of business." Hamill v. Purvis, 2 P. & W. 177, Pa. (1830).

4. *Liquidating partner may assign firm judgment, but cannot guarantee its payment.* B & C, partners, recovered judgment against D *et al.* They released D, and dissolved. C, liquidating partner, assigned judgment to A, and covenanted for firm that all defendants continued liable. D alone was solvent. A sued B for amount of judgment.—Not liable upon the covenant, though the assignment was valid. Bennett v. Buchan, 61 N. Y. 225 (1874).

5. *Firm not liable on its acceptance given by partner for his individual debt.* B & C were partners. On the maturity of an acceptance in his own name in favor of A, B, in part satisfaction, gave A another bill, and accepted it in the name of the firm, but without any authority from C. A sued the firm on the bill.—No recovery. If one partner gives the firm's acceptance in discharge of his own separate debt, the presumption is, that he does so without the authority of his copartner. If that fact had not been part of the plaintiff's case, he might have relied on a partner's implied authority to bind the firm. Leverson v. Lane, 13 C. B. N. S. (106 E. C. L.), 278 (1862).

§130.

Set-off is a medium of equity. Equity disregards procedure, and permits a set-off wherever the defendant has a claim against the plaintiff.

In Pennsylvania, any liquidated claim may be set off, though arising out of a different transaction from that in controversy. Partners might set off their moiety of a promissory note made by the plaintiff and owned by them in common with a stranger in an action for the price of merchandise.[1]

The firm is nothing but the partners, and as the partner is liable for the whole debt, which he may be

compelled by execution to pay out of his separate estate, he can set off his claim against it. If not permitted to do so, he might be forced to pay the debt to an insolvent creditor, from whom he could not subsequently collect his claim. A partner may avail himself of this right of set-off when sued alone, or in conjunction with his co-partners.

An assignment by the partner of his claim to the firm is not requisite.[2] The separate estate is exposed by the suit to the creditor's claim, and may be used to satisfy it. The firm cannot require the partner to allow them to set-off his private claim against the demand of a firm creditor, for that would compel an increase of his contribution. On the other hand, the partner may consent to the firm's use of his private claim as a set-off, in which case he advances his claim to the firm, and identifies the claim with the firm property.[3] A partner represents in his own person the whole title to firm property, and also the entire liability for a firm debt. Consequently, when sued alone, or in conjunction with his co-partners, he may always use his private claim to pay the firm's debt, for the debt and the claim are substantially in the same right.

The partner's right to make the advance to the firm by setting off his claim against the firm debt, does not depend upon his right to contribution against his copartners for the advance, but the right of contribution is a consequence of the right to make the advance.

1. *Set-off of half plaintiff's debt, due to defendants and a stranger.* A & Co., for the use of D, brought actions on the case, for goods sold and delivered, against B & C, who pleaded set-off and payment with leave, and offered in evidence, a promissory note of A & Co., payable to the order of E & Brother, and endorsed by E & Brother "without recourse." B & C proved themselves co-owners with F of the note. F had, in a previous suit, set-off his share against A & Co. —Set-off allowed. WOODWARD, J.,: "It is true the note could not

"be divided for the purpose of action, but it may be a defence under "the equitable plea of set-off." Smith v. Myler, 10 Harris 36, Pa. (1853).

By Common law, the joint right of action inhered in the partners. All must join in the suit, and one could not sue for all. A partner's express assignment would not invest his co-partner with the joint right of action.[a]

a. *Partners cannot empower co-partners to sue.* A, B & C, partners in stage line, and D kept stage-office. On settlement, partners directed D to pay receipts to A. He brought assumpsit for money had and received. Claim: Promise resulted from ownership as to one owner after payment to co-owners of their quotas.—Judgment for D. No property in specific money, as it could not be followed; but a chose in action, which could not be assigned without debtor's consent; nor had debtor consented to change his creditors, as he did by severing the debt, when he paid quotas of co-owners. Horbach v. Huey, 4 Watts 455, Pa. (1835).

As the reason for a joinder no longer exists, a partner may represent the firm with or without an assignment from his co-partner.[b]

b. *Assignment by firm to partner enables him to sue in joint name.* B assigned his interest in firm claim to A, and died. A sued in joint name. Defence: Plea in abatement; non-joinder of B's executors.—Judgment for A. Matherson v. Wilkinson, 8 Atlantic Rep'r 84, Me. (1887).

2. The Civil law seems to require an assignment.

„Wird die Gesellschaft unter ihrer Firma verklagt, so kann sie mit einer „ihr gegen den Kläger zustehenden Gegenforderung compensiren. Ob sie „dagegen die Privatforderung eines ihrer Gesellschafter in Aufrechnung „bringen kann, ist bestritten.—Es wird dies um deswillen bejaht, weil „durch die Ausklagung der Firma die sämmtlichen Gesellschafter mitverklagt „seien. Allein es wurde bereits gezeigt (§ 57), daß die gegen die Gesell„schaft als formelle Einheit gerichtete Klage unter den *socii* ein Litiscon„sortium ganz anderer Art wie dasjenige begründet, welches dadurch ent„steht, daß ein Gläubiger die einzelnen Gesellschafter zusammen verklagt. „Auch ist die Gesellschaft als solche nicht berechtigt, über das Privatver„mögen ihrer Mitglieder, selbst zur Tilgung von Societätsschulden zu ver„fügen, während der Gläubiger welcher seine Befriedigung aus dem Gesell„schaftsfonds sucht, sich auf jenes Vermögen nicht verweisen zu lassen „braucht. Demnach kann die unter ihrer Firma verklagte Gesellschaft mit „Privatforderungen der einzelnen *socii* nicht compensiren. Doch verhält „es sich anders, wenn die Privatforderung des Gesellschafters auf die „Gesellschaft übertragen worden ist—eine Ueberweisung, die Behufs der „Wettschlagung noch während des Rechtsstreits durch den die Societät ver„tretenden *Socius* hinsichtlich eines ihm gehörigen Anspruchs geschehen „kann." Renaud, „Das Recht der Commaditgesellschaft," *s.* 437,

3. *Plaintiff cannot credit a partner's claim on account of the firm's debt, without partner's consent.* A claimed $300 of B & C, and deducted $128 which he owed B & C, and $100 which he owed B. Defendants asked non-suit, because claim beyond justice's jurisdiction. —Entitled to non-suit. Defendants could not set-off B's claim, and plaintiff can't without their consent. Williams v. Hamilton, 1 South. 220, N. J. (1818).

„Die Gesellschaft wird unter ihrer Firma verklagt. Sie „kann mit einer Gesellschaftsforderung compensiren, aber nicht mit der „Privatforderung eines einzelnen Gesellschafters, denn wenngleich durch die „Klage gegen die Gesellschaft sämmtliche Gesellschafter belangt sind, so sind sie „doch nur mit Beziehung auf ihre gesellschaftliche Verbindung belangt. Sie „können sich daher auch nur unter der Firma der Gesellschaft einlassen und „können nur diejenigen Rechte ausüben, welche ihnen als Gesellschaftern „zustehen. Als solche aber haben sie nicht die Dispositionsbefugniß über „ein zum Privatvermögen eines Gesellschafters gehörendes Vermögenstück, „sie können also eine Privatforderung des einzelnen Gesellschafters weder „einklagen noch *compensando* geltend machen. Ebensowenig können sie „aber dies Recht aus den nach dem Gesellschaftsvertrag den einzelnen „Gesellschaftern obliegenden Verpflichtungen ableiten. Zwar würde, „wenn der einzelne Gesellschafter der Gesellschaft verpflichtet wäre, zur „Zahlung der Gesellschaftsschuld seinen Antheil in der Art beizutragen, „daß er ihn aus seinem Privatvermögen zahlte, bis zum Betrag dieses „Antheils mit der Privatforderung des einzelnen Gesellschafters gegen „den Kläger compensirt werden können. Bei der Handelsgesellschaft ist „ aber eine solche Verpflichtung der einzelnen Gesellschafter der Gesell„schaft gegenüber nicht vorhanden. Die Gesellschafter brauchen über „ihre vertragsmäßige Einlage aus ihrem Privatvermögen zu gesellschaft„lichen Zwecken nicht das Geringste zu verwenden bez. vorzuschießen. „(S. Bemerk. zu Art. 92, § 3.) Sie haben daher auch insbesondere keine „Einzahlungen zur Zahlung von Gesellschaftsschulden zu machen, noch „wenn eine Gesellschaftsschuld aus der Gesellschaftscasse bezahlt ist, den „Betrag derselben dieser Casse zu ersetzen, es fehlt daher der Gesellschaft an „jedem Rechtsgrund, der gegen sie gerichteten Klage die Privatforderung „eines ihrer Mitglieder entgegen zu setzen.—Die Frage wird übrigens von „praktischer Bedeuting nur für den Fall, daß der Gesellschafter die Benutz„ung seiner Forderung zur Compensation verweigert; denn in der Ueber„lassung der Forderung zur Compensation ist eine Cession enthalten (s. o. „Note 4), und die Gesellschaft ist zur Compensation der cedirten Forderung „berechtigt" (s. o. § 4). Von Hahn, „Commentar zum All. Deutschen „Handelsgesetzbuch," Art. 121, § 7.

A PARTNER SUED FOR A FIRM DEBT MAY SET-OFF A FIRM CLAIM WITHOUT HIS CO-PARTNER'S PERMISSION.

He might have taken money out of the firm exchequer, and paid the firm debt. He accomplished the same result by applying the claim, which is an asset of the firm, to the discharge of its obligation. Moreover, if compelled to pay the debt, he could recover from his co-partners contribution, which he merely anticipates by the set-off.[4]

As set-off is a medium of equity, the law searches out the party interested, and gives the benefit, or detriment, of set-off to him.[5]

4. „Er kann eine Gesellschaftsforderung gegen den Kläger zur Compen„sation bringen. Dernburg erklärt dies für zweifellos nur, wenn der

„beklagte Gesellschafter von der Vertretung der Gesellschaft nicht ausge„schloßen ist, ist jedoch geneigt, auch dem von der Vertretung Ausge„schlossenen diese Befugniß deswegen zuzugestehen, weil derselbe berechtigt „sein müsse, zu seinem Schutz alle der Gesellschaftsschuld inhärirenden Ex„ceptionen vorzuschützen, zu welchen auch die Conpensationseinrede gehöre. „Meiner Ansicht nach ist auch hier zwischen dem von der Vertretung ausge„schlossen und dem nicht ausgeschlossen Gesellschafter nicht zu unterscheiden. „Der Rechtsgrund, auf welchem die Zuläßigkeit der Compensation beruht, „ist der dem Gesellschafter, welcher eine Gesellschaftsschuld zahlt, gegen die „Gesellschaft zustehende Regreß und dieser ist der gleiche für alle Gesell„schafter. Die Eigenschaft als Vertreter der Gesellschaft kann für den in „eigenem Namen belangten Gesellschafter nicht in Betracht kommen." VON HAHN, Art. 121, § 8 (b).

5. At law, the firm could not set off a partner's claim against the joint creditor, because the claims were not by and against the same plaintiff and defendant,[a] The form, however, might be controlled by the fact. Partners could set-off their deposit against a note made by one and endorsed by the other, if and because discounted for the firm.[b]

a. *Partner cannot set-off his individual claim against plaintiff's claim against firm.* A, as B's trustee, sued C & D for price of fruit sold them. They pleaded set-off of A's note to D for $7,000. C died after plea filed.—Disallowed. Set-off determined by right at the time of bringing suit, not at the trial, when D was surviving partner. Johnson v. Kaiser, 11 Vr. 286, N. J. (1878).

b. *Firm deposit set-off against note, separate in form but discounted for the firm.* B made his note to C, his co-partner, and he endorsed it. D, a banker, discounted the note for the firm. B & C notified D, upon his failure to set off their deposit against the note, and he promised to make the off-set. D assigned for creditors, to A, who sued B & C. Defence: Set-off.—Allowed. The note, though in form, a separate, was in substance, a firm obligation, and the set-off was mutual. Joint suit admitted mutuality. Smith v. Felton, 43 N. Y. 418 (1870).

A PARTNER CAN SET-OFF HIS INDIVIDUAL CLAIM AGAINST A FIRM LIABILITY, WHEN SUED ALONE, OR IN CONJUNCTION WITH HIS CO-PARTNERS.

He owes the firm debt individually, and if he choses to appropriate his separate property to paying what is also the firm's debt, the co-partners could not object, if they would.[6] The partner owes the firm debt to the plaintiff, and the plaintiff owes the partner a debt. One extinguishes the other. A supercargo sued the co-owners of a ship, to the use of his assignees, for his services on the voyage. One defendant set off a

judgment against the supercargo recovered before the assignment.[7]

6. Co-obligors were sued by the assignee of the obligee. The debt of the real owner of the bond, for whom the assignee held it to one of the obligors, was set-off against the plaintiff. Wrenshall v. Cook, 7 Watts 464, Pa. (1838).

7. Stewart v. Coulter, 12 S. & R. 252, Pa. (1825). *Contra*, if proceedings at law where the obstacles are in the forms of procedure;[a] but the technical objections do not defeat the set-off in equity.[b]

a. *A partner can't set-off his separate claim in a suit against the firm.* Executors of A sued B & C for services, as manager of iron works. Evidence offered, by way of set-off, of A's agreement with B, to pay any debt contracted by C, and of C's contracting a debt for £12.—Rejected. Separate claim of partner not allowed as a set-off in a suit against them for a firm debt. Brown v. Thompson, Coxe 2 N. J. (1790).

b. *Obstacles to set-off at law do not prevail in equity.* B attached C, and D intervened. C settled with B, and enjoined D from proceeding, claiming that D was indebted to him for advancing D's share in different enterprise undertaken by them. D admits advances, but claims adjustment by partnership accounts.—Maintained. Set-off available in equity, without technical objections. Dungan v. Miller, 4 C. E. Gr. 219, N. J. (1868).

IF A FIRM SUES ITS DEBTOR, HE CANNOT SET-OFF A CLAIM WHICH HE HAS AGAINST ONE OF THE PARTNERS.

The plaintiff's claim belongs to both partners, and is indivisible; the defendant's claim is separate against a single partner. As the firm does not owe the debts of its members, the defendant cannot make it pay them by means of a set-off.[8]

The partners are liable severally, because they incur direct obligations to third persons, who enforce the contracts. They do not acquire severally, because nobody but themselves is involved in the transaction, and they have excluded each other, except for the firm balance. Hence the debt is not one to each partner. It is an asset of the firm, and if the assets were divisi-

ble, and owned in quotas by the partners, it would be set off against each, according to his aliquot share.[9]

8. *Separate debt of partner cannot be set-off against a firm claim.* A bought out B & C, and sued firm debtor, D, for balance of account. D included in account separate charges against B.—Items stricken out. Billings v. Meigs, 53 Barb. 272, N. Y. (1869).

The German Code prevents the set-off by a firm debtor of his claim against a partner during the partnership.[a] This results as RENAUD points out,[b] from the recognition of partnership property, which would, if the set-off were allowed, be misappropriated to the payment of a partner's individual debt.

After a dissolution of the partnership, the German Code admits the set-off, if there has been a division of the assets, against the share of the debtor partner.[c]

a. „Eine Compensation zwischen Forderungen der Gesellschaft und Privat- „forderungen des Gesellschaftsschuldners gegen einen einzelnen Gesellschafter „findet während der Dauer der Gesellschaft weder ganz noch theilweisse „statt; nach Auflößung der Gesellschaft ist sie zuläßig, wenn und insoweit „die Gesellschaftsforderung dem Gesellschafter bei der Auseinandersetzung „überwiesen ist." „All. Deutsch. Handelsgesetzbuch," Art. 121.

b. „Die Sonderung des Gesellschaftsvermögens von Privatvermögen der „einzelnen Gesellschafter äußert sich aber weiter darin, daß eine Compensa- „tion zwischen Forderungen der Gesellschaft und Privatforderungen des „Gesellschaftsschuldner gegen einen einzelnen Gesellschafter während der „Dauer der Gesellschaft weder ganz noch theilweise Statt findet." Re- uaud, *s.* 436.

c. „Nach Auflößung der Gesellschaft, etc. Da nach §.4 eine „an einen Gesellschafter cedirte Gesellschaftsforderung auch während der „Dauer der Gesellschaft von dem Gesellschafter gegen die Forderung „seines Privatgläubigers aufgerechnet werden kann, so würde die Bemerk- „ung Dernburg's das der Schlußsatz nicht glücklich gefaßt sei, zutreffend „sein, wenn nicht die eigentliche Bedeutung dieses Satzes darin zu suchen „wäre, daß die Compensation auch nach Auflösung der Gesell- „schaft unzuläßig bleibt, so lange die betreffende Forderung noch zum „ungetheilten Gesellschaftsvermögen gehört. Es Entspricht dies völlig dem „in Art. 119 ausgesprochenen Princip." Von Hahu, Art. 121, §. 5.

9. Smith v. Myler, *supra* n. 1.

THE PARTNER MAY SET-OFF A FIRM CLAIM AGAINST HIS INDIVIDUAL DEBT, IF HIS CO-PARTNERS CONSENT TO THE APPROPRIATIŎN.

They can do with their own what they please, and may devote it to paying off a partner's debt. If the firm consents to the partner's use of its claim, he may apply it by way of set-off against his separate

debt. He owns the claim by a joint title, and no one but his co-partner can object to the application.[10]

The defendant partner could not make the set-off without the consent of his co-partners. The plaintiff in such a case would not be entitled to rely, as RENAUD states,[11] upon the implied authority of the partner, who does not act on behalf of the firm, and the use of the firm asset to pay his private debt is notice to the plaintiff, who, as an individual creditor, participates in the fraudulent misappropriation of the firm asset.

10. Co-makers of a promissory note, who were sued by the payee, set-off a debt due by the plaintiff to a different firm, of which the defendants were partners, their co-partners having consented. Tustin v. Cameron, 5 Wharton 379, Pa. (1840).

Firm clerk's recognition of a partner's agreement to set-off firm debt against his individual debt binds firm. C hauled wood for A, who agreed to pay him in goods from store of A & B. A received first load, and firm clerk received the three other loads. A & B sued C for balance, less three loads received by their clerk.—Bound to credit the four loads, as firm clerk acted on basis of A's contract. Hood v. Riley, 3 Gr. 127, N. J. (1835).

11. „Wird ein Gesellschafter aus einer Privatschuld belangt, so kann er mit
„einer Forderung, welche der Gesellschaft gegen den Kläger zusteht, dann
„nicht compensiren wenn er von der Vertretung der Societät ausgeschlossen
„ist, da ihm über einen solchen Ausspruch, ungeachtet er Theil an demselben
„hat, keinerlei Disposition zukömmt. Ist er dagegen von der Repräsenta-
„tion der Gesellschaft nicht ausgeschlossen, so ist er zur Compensation mit
„der ganzen Gesellschaftsforderung ohne Rücksicht darauf, ob die Wett-
„schlagung im Interesse der Societät liegt, um deßwillen berechtigt, weil er
„Dritten gegenüber ein unbeschränktes Verfügungsrecht über den Gesell-
„schaftsfonds hat. Zwar wird hiergegen geltend gemacht, es könne der
„repräsentationsberechtigte Gesellschafter nur im Namen der Societät über
„deren Forderung verfügen; eine solche Verfügung liege aber nicht vor und
„sei nicht möglich, wenn der in eigenem Namen verklagte *socius* auf die
„Klage sich einlasse. Allein es kann daraus einer Privatschuld belangte
„Gesellschafter so fern er von der Vertretung der Societät nicht ausge-
„schlossen ist, sich Namens letzerer eine Gesellschaftsforderung überweisen,
„um sie alsdann zur Compensation zu benutzen, ja ohne förmliche Ueber-
„erweisung im Namen der Gesellschaft zustimmen, daß deren Forderung
„zur Wettschlagung benutzt werde. Renaud, *s.* 439.

IN AN ACTION BY A PARTNER, THE DEFENDANT MAY SET-OFF A CLAIM AGAINST THE FIRM.

The partner owes the debt (defendant's claim), as an individual, and he cannot object to pay it when made a set-off to his separate claim.[12]

12. „Klagt endlich ein Gesellschafter eine Privatforderung gegen Dritten ein, „so kann dieser eine ihm gegen die Gesellschaft zustehende Forderung mit „dem ganzen Betrage in Aufrechnung bringen, weil der verklagte seinen „vollen Anspruch klageweise gegen den *socius* geltend machen könnte. Aus „dem nämlichen Grunde findet eine Compensation gegen einen Comman-„ditisten hier nur insoweit Statt, als dieser für die Gesellschaftsschuld direct „dem Gläubiger haftet." Renaud, *ss.* 439–40.

A SURVIVING PARTNER CANNOT SET-OFF A FIRM CLAIM AGAINST HIS INDIVIDUAL DEBT.

Originally, he could do it, because the firm's rights of action survived to him alone,[13] although the act would be a breach of the relation.[14] Now, however, since the deceased partner's estate is charged with the firm debts, the surviving partner should not be permitted to use the firm claims by way of set off.[15] At the death of the partners the rights of their creditors become fixed, and a claim not previously established is unavailable for set-off.[16]

13. A surviving partner could set-off his individual debt against a firm debt, or a firm against an individual debt, because the rights of action survived to him. Henderson v. Lewis, 9 S. & R. 379, Pa. (1823).

14. But this is a breach of the relation. 1 Lindley, Law of Partnership, 529.

15. The claims remain distinct.
Separate claim of partner will not keep open and running an account between firm and stranger. A, as surviving partner, sued C for items barred by statute of limitations. C had set up a counter claim against A individually, not yet outlawed.—Judgment for C. The accounts were not mutual, so as to give A benefit of the date of C's last item. Eldridge v. Smith, 144 Mass. 35 (1887).

16. *Equality of distribution prevents a set-off after the death of the partner.* On the death of a surviving partner, his executors attached the property of a firm debtor in the hands of a bank, and obtained judgment against the garnishee. The garnishee attempted to set-off a claim against the firm on an endorsement which fell due after the surviving partner's death.—Disallowed. An unlawful preference. Distribution must be equal among the creditors of decedents. Cramond v. Bank of U. S., 1 Binn. 64, Pa. (1803).

A PARTNER WHO IS SUED FOR A FIRM DEBT CAN SET-OFF HIS CO-PARTNER'S CLAIM AGAINST THE PLAINTIFF, IF THE CO-PARTNER CONSENTS.

The authority to make the set-off must be express. No such power will be implied, for that would enable a partner to increase arbitrarily his co-partner's contribution. A creditor may enforce the several liability of the co-partner in the first instance, but the partner has no right to compel the payment of a firm debt out of the separate estate of his co-partner, except by way of contribution to a payment previously made by himself.

The partner, if compelled in the separate action to pay more than his share of the firm debt, is entitled to contribution, and, therefore, he in fact represents his co-partner for the excess. By allowing the set-off, the co-partner who was not joined simply pays a debt for which he would ultimately be liable. If a partner should refuse to avail himself of such a set-off when offered by his co-partner, he would deprive himself of his right to contribution for the payment which he had needlessly made. Where the partner who is sued has already paid more than his proportion of the firm debts, it would be important for him to compel the application of his co-partner's claim to the satisfaction of the firm obligation. He could not accomplish this end by the machinery of the Common law. A plea in abatement for the non-joinder of his co-partner would not serve his purpose. That would enable him to fix the liability, but not to control the separate property of his co-partner. Yet he would have a clear equity available in a Court of Chancery. But there must be some proceeding in which the part-

nership account and all the parties are before the court.

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§131.

An assignment for creditors is not within a partner's competence.

No such assignment by a single partner is allowed, except when his co-partner is out of the jurisdiction, and cannot be consulted, and then only if an adverse sale is impending.[1] Under such circumstances, the authority is implied to a partner who may exert the power, as he represents his co-partners, rather than let a stranger exert the power and effect a forced sale, which might sacrifice the stock.[2]

The partner, it is said, by such an assignment, delegates his capacity to the assignee, and this delegation is, by the general principles of partnership, beyond his authority.[3] The correctness of this reasoning may be questioned. The assignment does not involve the delegation of a partner's capacity, for the assignee becomes a trustee for creditors, and not merely a substitute for the partner. The assignee, it is true, does, in part, discharge the function of a partner, inasmuch as he applies the assets of the firm to the payment of its debts. But the sheriff would perform the same function. True, he only executes an adverse process, but the difference between the effect of an execution and of an assignment in this respect is only apparent, for it is not maintained that a partner can appoint an assignee, except to forestall an execution.

A partner can not prejudge the expediency of an act which may involve the existence of the firm, and the financial career of its members, unless it is obvious that there was no alternative. In such a dilemma, it is proper that the discretion should be exercised by one identified with the business rather than by a hostile creditor.[4]

In considering this question, it must be borne in mind that a partner is clothed with a power similar in kind and greater in extent in those jurisdictions where he is permitted to confess a judgment under which the firm assets may be sold, because this power has never been made dependent upon the absence of his co-partner or the inability to consult him.[5] An assignment for creditors by a partner is permitted only as a means of forestalling adverse proceedings, and thus becomes a protection to the firm; but a confession of judgment is a surrender of the firm to a hostile creditor.

1. Sloan v. Moore, *Supra* § 115, n. 1.

Power to assign for creditors not implied in any number of partners less than all. A being in Europe on firm business, B & C notified him of embarrassment, and asked him to return. He dispatched a letter, which was received, saying he was *en route*. He was delayed by stress of weather, and nine days before his arrival B & C assigned for creditors to D. A brought bill for dissolution account, injunction and receiver.—Decree. No authority to assign in anticipation of A's return. Wetter v. Schlieper, 4 E. D. Smith 707 N. Y. (1858).

All partners must join in assignment for creditors. In absence of co-partners, D and E, on business, one in Cuba, the other in California, B and C assigned to A, for creditors, with preferences. F levied on goods in hands of A, who sued to recover.—Judgment for F. No emergency to justify assignment by less than all co-partners. Pettee v. Orser, 6 Bosw. 123, N. Y. (1860).

A partner may, of course, assign his separate estate for the satisfaction of the firm creditors.

Partner in insolvent firm may convey his separate property in satisfaction of a firm debt. B, member of insolvent firm, conveyed his separate property, to certain firm creditors, in satisfaction; then firm made assignment. Assignee sought to include conveyance as part of assignment.—Dismissed. Partner may apply his separate property

to pay any firm creditor in full. Elgin Watch Co. v. Meyer, 30 Fed. Rep'r 659, Mo. (1887).

2. *If partner absconds, co-partner may assign for creditors.* B & C, partners, mortgaged firm stock to D, creditor of B. Then B absconded, and C assigned, for creditors, to A, with preference to mortgagee. After A took possession, sheriff levied on goods, and A sued him to recover possession.—Recovered. Assignment good, though preference void. Kemp v. Carnley, 3 Duer 1, N. Y. (1853).

Assignment by partner for creditors allowed to save firm stock from adverse and forced sale by execution creditor. C & D were partners in coach-building, and contracted debts. A levy was made on their stock in trade, consisting, *inter alia* of unfinished carriages. D thereupon ran away, and left the country. To save loss, C executed a bill of sale of the entire stock to A and the other creditors. The sheriff, B, then gave up the stock to A and others, who took it, employed workmen, among them C himself, and carried on the business. Then an execution issued, at the suit of E, against C & D, which was put into the hands of B, who, being indemnified by E, levied on the property in the possession of A and others, as the property of C & D, and sold it. A *et al.* brought trespass against B. Defence: That the bill of sale was illegal, because of the entire stock, and by C alone, especially as it was under seal, and, further, that the employment of C by the plaintiffs was part of the consideration of the transfer, and invalidated it. First point ruled against the defendant. Second point ruled for the defendant, if the jury should believe the fact. But verdict for plaintiff, and judgment accordingly.—Affirmed. ROGERS, J.: "It is "a general principle of the law of partnership, that the partners are "bound by what is done by each other in the course of the partner-"ship business. * * * Among the powers most ordinarily exercised "by partners, is the *jus disponendi.* * * * It is admitted he can "sell part without the actual consent of his associates, and the policy "of limiting that right is not very apparent, when the transaction is "conducted in good faith; still less in a case like the present when "the arrangement is most clearly for the benefit of the firm. * * * "When the assignment is *bona fide*, I cannot doubt the power of one "partner to transfer the whole as well as a part of the partnership "effects. * * * The fact of fraud was left by the Court to the jury, "and they have found that the contract was *bona fide.* Deckard v. Case, 5 Watts 22, Pa, (1836).

3. *Partner can't assign for creditors without co-partner's consent, and intervening attachment takes precedence.* B & C were insolvent, and B published dissolution. He assigned for creditors, to D, and filed the assignment. Later in the day, A attached firm property. D had previously consented to be trustee, but the assignment was not delivered to him, nor did he know of it, until after the attachment, when he at once accepted the appointment. C, though in town, was not consulted by D when he made the assignment. When informed of it, C at first hesitated, but subsequently consented to it. Parties agreed to let D sell the property attached and hold the proceeds in its place. A disputed them with D.—A recovered. Assignment not an ordinary firm transaction. B not acting as, but appointing, an agent. He could not assign for creditors without C's concurrence, and intervening attachment cut out the assignment. Holland v. Drake, 29 Ohio St. 441 (1876).

One partner cannot assign for creditors. B assigned firm stock to C, for creditors, without knowledge of co-partner, A, who enjoined

B & C.—Decree. Partner cannot delegate his discretion. Hayes v. Heyer, 3 Sandf. 293, N. Y. (1849).

Partner no power to assign for creditors if co-partners at hand. A majority of partners assigned for creditors. It would appear that the minority were consulted.—Assignment invalid. Partner may assign all firm stock to firm creditors, but not appoint a trustee, *i. e.*, a third person, who will control co-partners in liquidation. He cannot delegate his own authority, nor deprive his co-partners of power. Fisher v. Murray, 1 E. D. Smith 341, N. Y. (1850).

The partner can neither delegate his own or limit his co-partner's capacity. An agent could not exert the co-partner's rights. Thus a clerk can not create an independent liability against the firm,[a] but he may carry out a contract made by them.[b]

a. *Agent cannot use partner's name for firm.* B was managing clerk, with authority to give notes for firm. He signed a partner's name and subscribed his own initials to a note given to A on firm account. B so signed notes before, and paid them with firm money, but without the knowledge or authority of the partner, or of the firm. A sued on the note. Defence: A firm transaction.—Liable, because note not given in firm name, and no implied authority to act for firm in a partner's name. Palmer v. Stephens, 1 Denio 471, N. Y. (1845).

b. Hood v. Riley, *supra* n. 10.

4. *Assignment or mortgage of entire firm stock void, unless with consent of all the partners.* B & C, partners, insolvent. C made, 8 November, 1886, firm note to A, for $2,529.31, for merchandise, due 9 November, 1886, secured by chattel mortgage of all the firm property. A foreclosed. Defence: Partners agreed, 6 November, 1886, to assign for creditors, to D. Assignment prepared by attorney, and, 9 November, B executed it for the firm. D accepted.—Judgment for D. Assignment made with C's concurrence valid. Mortgage without B's assent void. Osborne v. Barge, 29 Fed. Rep'r 725 (1887).

5. *Supra* § 122.

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§132.

The assignment for creditors by a partner is *prima facie* a dissolution of the firm.

An assignment for the benefit of creditors is not necessarily a dissolution of the firm. The stock goes to the assignee.[1] The good-will belongs to the creditors, if it is an asset. The partnership might go on if not only the business itself, but also the name which

individualized the firm passed to its creditors. If they, like the creditors in Cox v. Hickman, or a Scotch bankruptcy, took possession of the firm and ran it for their own benefit, the partnership would be suspended during the interval. They would not be restrained from the use of the firm name, or from any solicitation of the firm customers. Without either or both of these constituents, the firm would be in suspense. But the assignment is not equal, in its effect, to a bankruptcy, and need not dissolve the firm.[2] If the debts are paid off by the assignee a right may result to the firm or to the partners, who can then proceed to trade again.

It is a question of intention for the jury. If to resume after a settlement, a subsequent bankruptcy would stand; if a dissolution intended, no firm exists to be put into bankruptcy.[3] The result is that, upon a re-assignment of any surplus to the partners, a former creditor would compete with new creditors of the resuscitated firm.

1. Unless restricted to the firm stock, the assignment also carries the separate estate of the partners.

Partners' assignment for creditors not confined to firm property by construction. A & B assigned all their property for creditors, describing themselves as a firm, and stipulating for a release.—Sustained, because not in terms confined to firm property. Orr v. Ferrell, 5 S. W. Rep. 490, Texas (1887).

2. But the *prima facies* is often taken for the invariable effect.[a]

a. Assignment for creditors dissolves firm. A & B assigned for creditors, who accepted their dividend as payment. Certain articles mentioned in the assignment as by law exempt, were returned to the partners who had contributed them, respectively. A brought bill for account against B.—Dismissed. Firm dissolved by assignment, and nothing to account for. Wells v. Ellis, 68 Cal. 243 (1885).

3. *A partner may make an assignment for creditors. Whether assignment works a dissolution, or not, for jury.* B, C, D & E, partners. B made an assignment of all firm property, to F, for creditors. Subsequently, B, D and E assigned to G, for creditors. D continued business, under old firm name of D & Co. H, of firm H & I, signing

petition for himself and co-partner, obtained a commission in bankruptcy against the four partners. A sued the firm for an old debt. Defence: Bankruptcy. A attached petition and denied firm existence.—Validity of bankruptcy proceedings depends on the effect of assignments. If firm dissolved, no joint commission could issue; if firm continued, the proceedings regular. Question for jury, whether the assignments meant to close firm transactions for the future, as well as for the past. Pleasants v. Meng, 1 Dall. 380, Pa. (1788).

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§133.

The authority of a partner cannot be restricted by his co-partners.

Each partner has authority to act for the firm, and the co-partners' forbidding him does not devest him of his authority, although notice of the prohibition is given to the person who is dealing with the partner.[1]

The insolvency of a partner does not deprive him of the right to manage the business. The solvent partner cannot claim that insolvency is equivalent to death, and invests him with the rights of a surviving partner. The insolvent partner cannot be ousted from his control, except for cause shown.[2] A partner cannot by notice revoke his co-partner's authority to collect a firm claim. The authority is not subject to the partner's control, even upon insolvency and dissolution.[3] There is no supremacy among partners, but they are all equals.

The partner's right is incident to the business. He may lease premises for the firm.[4] Each attorney exerts the powers of all in legal transactions.[5] A partner may re-deliver goods upon a return of the firm notes given for the price. The merchandise returned

satisfies the debt, although the insolvency of the firm prevents it from satisfying its other creditors.[6]

1. *Partner's authority in firm business cannot be restricted by a co-partner.* B, C & D, partners. B drew on A for the firm use, and gave a written indemnity in the firm name. C, in A's presence, dissented from the indemnity, but subsequently applied the proceeds of the acceptance to the payment of rent on a lease, taken in his own name, of the store occupied by the firm. A sued B, C & D.—Recovered. B had implied authority to bind the firm by the indemnity, in spite of C's dissent. Wilkins v. Pearce, 5 Denio 541, N. Y. (1848).

2. *Insolvency does not deprive partner of joint control.* A *et al.*, being insolvent, dissolved partnership with B, and sued him for account and receiver. B's defence: Solvent, and entitled to liquidation, like a surviving partner.—Decree. Analogy too remote, but B might be appointed receiver if unimpeachable. Hubbard v. Guild, 1 Duer 662, N. Y. (1853).

3. *Partner cannot revoke, by notice, co-partner's authority to collect firm claim.* A & B were co-owners of a ship, and partners in the cargo. B, as ship's husband, insured ship and cargo in his own name, with C, for whom it might concern; policy payable to himself. There was a total loss. C paid B a portion, and was then notified, by A, to pay no more to B, because he was insolvent, and A was interested in the payment. C did, however, pay the balance to B, and A sued for it.—Judgment for C. Neither dissolution nor insolvency incapacitates a partner from receiving firm money. Notice by copartner ineffectual, because stranger did not know the state of partnership account. Gillilan v. Ins. Co., 41 N. Y. 376 (1869).

4. *Partner may bind the firm for rent of premises necessary for the business.* B took a lease of brewery for 10 years. He became bankrupt during the third year, and C obtained from the assignee an assignment of the term to C & D, though without D's knowledge, and C contracted for the firm to pay the rent. C & D occupied the premises, and, upon dissolution, both executed an assignment of the lease. A, as lessor, brought assumpsit against C & D for the rent.—Recovered. Renting brewery without B's authority is an incident of the business, and ratified by D's subsequent recognition of it. Stillman v. Harvey, 47 Conn. 26 (1879).

5. *Attorneys in partnership delegate authority of all to each member.* Counsel signed bill as A & B. Defendants objected to joint signature.—Sufficient. Rule to restrain attorneys, but control of firm reached the members, and each has authority of all. Hampton v. Coddington, 1 Stew. 557, N. J. (1887).

6. *A partner may re-deliver goods in return for the price, although his firm is embarrassed.* A sold coal to firm, which was embarrassed, and gave notes for the price. B, a partner, gave A a bill of sale for the coal which was lying on the wharf. The next day sheriff levied on the coal, and A replevied, and obtained verdict for $2,866.43. Judge charged that A had authority to re-deliver coal in satisfaction of the debt.—Sustained. Boswell v. Green, 1 Dutch. 391, N. J. (1856).

§134.

By agreement, the partners may restrict the authority of a partner between themselves.[1]

Outsiders are not affected by the arrangement,[2] unless notice of it is brought home to them,[3] and then slight evidence will be deemed sufficient to make out a waiver of the restriction.[4] A partner who was forbidden to buy except for cash, bought on credit. The seller knew of the restriction, but as the co-partner knew of the sale, his failure to dissent was deemed a waiver. His assent was not necessary.[5]

1. *Limitation of liability by agreement inter se.* Unincorporated society provided by its constitution that fund alone should be liable, without recourse to members, and that its officers should not contract, except upon this basis. They did, nevertheless, contract with A, without reservation. A sued the members as partners. He could not aver execution of authority in conformity to articles, but he might recover on a *quantum meruit.* Sullivan v. Campbell, 2 Hall 271, N. Y. (1829).

2. *Contract between partners does not affect creditors.* B & C gave A firm note, and dissolved partnership. B undertook, as liquidating partner, to assume outstanding debts, and gave C note for his share. A sued firm. C set up B's assumption of A's debt.—No defence. Gulick v. Gulick, 1 Harr. 186, N. J. (1837).

   Custom controls secret agreements. By articles A could not contract without consent of B, his co-partner. A did so contract, and, in a suit against firm, B set up want of authority.—Liable. Frost v. Hanford, 1 E. D. Smith 540, N. Y. (1852).

   Agreement to restrict liability to amount contributed ineffectual. A & B, with 20 others, agreed to equip a steamboat, and run her between two ports on joint account, to contribute to expenses in instalments, and share the profit and loss in proportion to their subscriptions, though they restricted the loss of each party to the amount of his subscription. B, on A's demand, promised to pay his second instalment. A who had advanced money for expenses, sued B for his quota. B asked for non-suit.—Refused, because B's promise made him liable on account stated, though he was a partner, and A could not sue him on partnership account. Brown v. Tapscot, 6 M. & W. 119 (1840).

3. *Contract of partners inter se binds stranger with notice of it.* Agreement between B, C & D, that D should neither participate in the profit or loss, nor be liable as a partner. A, who had notice of the agreement, sued D, as a partner.—Not liable to A, because he knew of the arrangement. Alderson v. Pope, 1 Camp. 404, note (1811).

4. Johnston v. Bernheim, *supra* § 115, n. 3.

5. *Partner's act in excess of authority validated by co-partner's knowledge.* B contributed $2,000, and limited his liability to that amount. C managed the business, and could buy only for cash. He bought on credit, of A, who knew of the arrangement, but with B's knowledge. A sued B.—Liable, because he knew of the purchase. Mason v. Partridge, 66 N. Y. 633 (1876).

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§135.

The partners may ratify the act of a co-partner in excess of his authority, if done in the name of the firm.

A ratification implies that the act ratified was done in the name of the principal. If so done, the subsequent ratification binds the principal, whether he received any benefit from the transaction or not. If the contract was not made in the name of the principal, his subsequent adoption of it would not make him liable on the promise without a new consideration.

It is often said that the act ratified must have been done on behalf of the principal. The meaning of this phrase must be that the act was done in the name of the principal.[1] In so far as any different signification is given to it, the phrase is incorrect. The promissor in entering into a contract in his own name, may intend that a third person shall have the benefit of the engagement. If the third person has previously authorized the contract, he is liable to the promissee as an undisclosed principal. But if there was no precedent authority, there is no way to make the third person liable to the promisee on the contract. There is no opportunity for ratification, because the want of authority can never be supplied by ratification, unless the promisee contemplated the third person as the principal at the time the contract was made. The

reason is that ratification is not merely an expedient for charging a principal with liability, but is a means of confirming a man as party to a contract made in his name, but without his authority. By ratification the principal becomes in fact, as well as in name, a party to the contract, and he not only incurs its burdens, but may compel performance by the other party. The proposition is not that a man is liable because he has ratified, but that where the act is done in his name, he has the right to ratify and take the benefit with the burden. But a man can have no right to intrude himself as a party into a contract made without reference to him. For this action the testimony of the nominal promissor is inadmissible to prove his secret intention that a third person should have the benefit of the contract. Conversely, therefore, the other party to the contract can have no right against a third person upon proof of such secret intention, and its subsequent adoption by him as the intended beneficiary. Such a transaction can take effect only as a new contract. The promissee may sue an undisclosed principal upon the equitable ground that he was the real party in interest, but must prove that the defendant, though undisclosed, was, in fact, the principal at the time the contract was made. The defendant might plead any set-off he had against the promissee, as the agent might have done had suit been brought against him. The undisclosed principal has no right against the other party to the contract, except through the agent. The liability of the undisclosed principal is equitable, not contractual, and the rule does not apply unless he was the party in interest at the time the contract was made. If the

evidence shows that the defendant did not become interested in the contract until after it was made, he could not be held upon the equitable ground that he, in fact, caused the plaintiff to part with the consideration, nor upon the contract to which he was not a party.

The act of a partner, in excess of his implied authority as agent of the firm, binds him, because he warrants his authority to do the act. But his co-partners are not bound, unless they adopt the act in excess of authority as their own act.[2] As the act is on behalf of all the partners, the adoption by each is based on the adoption of all. Unless they all make the act their own, by adopting it, the adoption by a single partner will not bind him, because he does not intend to assume the individual liability for the *ultra vires* act, but only to share it with his fellow-principals, on whose behalf the act was done. Unless they also adopt the act, the condition upon which he adopted it is not fulfilled, and he is not bound.[3] He consented, as one of the firm, to embrace the act within its province, but to enlarge the scope of the partnership requires the consent of all the partners.[4] It is not to be presumed that the partner who adopted the act meant to assume the entire responsibility himself, alone. He was willing to extend the partnership, so as to cover this act, if his co-partners agreed to it. They could not do it, unless all concurred. The act would not be duly authorized unless every partner adopted the act, and thus brought it within the limits of the partnership business. The act was done on behalf, not of a single partner, but on behalf of all. The ratification could be only by

all. Ratification by one partner would not correspond to the authority assumed and meant to be ratified.

The partner who does not join in a specialty executed for the firm may, nevertheless, be bound in any one of four ways? 1, He may authorize his co-partner to execute the specialty for him, and in his name. 2, He may be present at the execution of the specialty, know of the transaction, and not dissent. 3, He may subsequently ratify the transaction. In these three cases he is bound by the covenants. In the first case the precedent authority, and in the third case the subsequent ratification, may be given by parol.[5] In the second case the failure to dissent is equivalent to actual execution.[6] 4, He may authorize the act in question, but not its embodiment in a specialty. In this case he will be bound, not by the covenant, but by the contract, and the seal will be disregarded, as surplusage.[7]

The argument is frequently urged, that a partner should have the power to bind the firm by a seal, because the authority does not exceed the power which he exercises by means of commercial paper.[8] This reasoning betrays an ignorance of the exceptional privilege conferred upon the partner by commercial law. As has been pointed out, the power to bind the firm by commercial paper does not spring from the relation, but is superinduced by rules which are inconsistent with partnership, and which supercede its principles.

1. A firm may ratify the act of a partner which is *ultra vires*. The ratification operates not simply as evidence

of original authority, but as a substitute for the want of authority.[a]

a. *Partner may ratify co-partner's unauthorized use of firm credit.* B & C, attorneys, in partnership. B made his individual note to B & C, and endorsed it, in their name, for his separate debt. A discounted the note, with knowledge. When informed of the note, C promised to pay it. A sued B & C.—Recovered. A ratification, which is not evidence of original authority, but a substitute for want of authority. Commercial Bank of Buffalo v. Warren, 15 N.Y. 577 (1837).

Execution of specialty by partner prevents a bill to reform it in Chancery. B & Co. settled with A & Co., giving judgment-note for balance due, signed B & Co. [L.S.] by B [L.S.]. A & Co. issued execution against B, who was insolvent and out of jurisdiction. Then brought bill to reform the note according to both parties' intention, which charged firm of B & Co.—Dismissed, because A & Co. ratified the legal construction of the note, which, otherwise, Chancery would have reformed. McNaughten v. Partridge, 11 Ohio 223 (1842).

2. *Partners executing specialty in firm name was bound by the deed.* B, C & D were partners. B wrote a note payable to A, and D sealed it. C was not present, but the note was in the name of the firm. A sued B and D.—Recovered. WOODWARD, J., said: "The jury found "that the two parties sued, sealed or assented to the sealing of this "note, and it is in nowise material that they used the name of a firm "in which [C], who was not present or assenting, was a partner. By "whatever name they call themselves, the defendants are liable ac-"cording to the tenor of the instrument they signed." Potter v. McCoy, 2 Casey, 458 Pa. (1856).

3. If the scope of the business is enlarged, the partners must add the constituent power, and all must ratify the act in excess of authority. If not, none of the partners are bound, not even the ratifying partners.[a]

a. Roberts' Appeal, *supra* § 24, n. 8.

4. If the firm exceeds the scope of the business for which the partnership was formed, the consent of every member must be obtained, in order to justify the firm in undertaking the new business.[a]

a. *Partners can do no act beyond the scope of the business unless all consent.* The stockholders of an unincorporated society passed resolutions by unanimous vote, changing their previous articles of agreement. Subsequently, a portion of the stockholders signed new articles, under which the original articles were again put in force. Some of those who did not sign these articles asked an injunction from the court to prevent this.—Injunction granted. All must consent to any change in the articles of the association. And until that is done, any change is beyond the scope of the business, which any of the stockholders, being tenants in common, can stop by an injunction. Livingston v. Lynch, 4 Johns. Ch. 573, N. Y. (1820).

5. The partners may ratify by parol a specialty executed by a co-partner.[a] But subsequent assent is also an ac-

knowledgment of the deed which is executed in the firm name and on its behalf.

a. *Co-partners not present when the contract is sealed by the partner in the name of the firm, may afterwards ratify it by parol.* A sued B & C on an agreement under seal executed by B in the name of the firm. C was absent when the agreement was executed, but the firm enjoyed the benefits of the contract, and C paid A's agent money due under it. A brought covenant.—Recovered. STRONG, J.: "Concede now, that knowledge of the thing alleged to have been ratified, is essential to ratification. Existence of that knowledge, like "that of any other fact, may be inferred from circumstances. * * * "Surely there was some evidence of knowledge of an existing contract, and of a contract with [A], and of assent to it. * * * And if "[C] knew of the contract, then his subsequent use of the machine, "and payment for that use, were acts of ratification." Jones v. Battin, 6 Casey 84, Pa. (1857).

Ratification of partner's ultra vires contract by acts. B employed A in matters beneficial to firm of B & C, but not strictly in the line of its business. C paid A money for expenses, and had consultations with him in reference to the business. A sued firm for services. Defence by C: B had no authority to employ A on firm account.—Judgment for A. C's conduct a ratification. Holmes v. Kortlander, 31 N. W. Rep'r 532, Mich. (1887).

6. The assent of a partner who is present at the execution of a specialty makes it his act.[a] He, in effect, directs the performance.

Presence of partner at execution of deed by co-partner for the firm makes the deed his act. B & C were partners, and B, in the presence of C, who assented to, and authorized the transaction, assigned certain bonds to D, by an instrument under seal and in the name of the firm. There was a covenant in the instrument that in case the amonnt of the bonds could not be recovered: "We do promise and agree and pay the amount thereof," etc. A, the executor of D, brought covenant against B & C. C appeared and pleaded *non est factum*.—A recovered. Fichthorn v. Boyer, 5 Watts 159 (1836).

7. The requirement that the authority to attach a seal should be delegated by deed is relaxed. But unless subsequently ratified, the act would bind the firm, not as a deed, but as a simple contract.[a]

a. *Though the deed of a partner may be ratified by parol after execution, it is still necessary that the precedent authority, if relied on, should be under seal.* A brought covenant against B, C & D, partners, trading as B & Co., upon an agreement under seal, executed by B in the name of the firm, but not in the presence of C & D.—No recovery. GIBSON, C. J.: "A thing done in the presence of another, and at his "request, is his immediate act. * * * One may adopt as his own, a "seal affixed by another without his authority, or even against his "will, and the delivery being his immediate act, makes the instrument his immediate deed. The law is fixed and certain, that the "authority of any agent to bind by deed, can in no case or under "any circumstances, be by parol." Hart v. Withers, 1 P. & W. 285, Pa. (1830).

Contra, Gram v. Seton, *Infra*, next note.

8. *Authority to execute deed ratified by parol.* B signed and sealed a charter party, in firm name of B & C, without any special authority from C. B & C acted under the instrument, but when A sued them, to compel payment of balance due, C's defence: *Non est factum.*—Judgment for A. Necessities of business demand recognition of partner's authority to attach seal without warrant of attorney. Previous permission or subsequent assent makes deed bind co-partner. To establish previous permission, presence at time of execution not essential. Analogy of commercial paper. Remedy, covenant. Like co-lessees, who, if one lessee signs lease, and both occupy under it, are liable in covenant. Gram v. Seton, 1 Hall 262, N. Y. (1828).

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§136.

An infant partner must disaffirm at majority, in order to escape past and future liability for his acts as an infant.

The peculiarity of ratification by an infant is, that his continuance of the business after attaining majority is treated as an affirmance of all the transactions of the firm during his infancy.[1] This conclusion is suggested by the analogous and admitted principle that where an infant retains, after majority, the property, which he might return, he becomes liable for the price.[2] The analogy is not perfect, because by continuing in the firm he retains no physical property which might be handed over to a firm creditor. But he retains the benefit of his position as a partner and co-proprietor of the business. The firm business is the product, among other things, of the contracts made during minority. If then the infant does not dissolve at majority, and notify the firm creditors of his retirement from the firm, besides rendering himself liable on the firm contracts made during his membership, he becomes liable on the subsequent contracts of the firm.[3] The firm customers, have dealt with him as a partner and have known that he was a co-proprietor

withdrew and sued for his contribution, with interest and for his services.—Judgment for B. A cannot anticipate his election to affirm or disaffirm the partnership contract, but must await his majority. Dutton v. Brown, 31 Mich. 182 (1875).

c. *Infant partner cannot recover contribution or compensation.* A, infant, contributed $100 to partnership with B, adult, and gave his services to business for a year and seven months, when he dissolved, and sued B for his contribution and for compensation for services.—Judgment for B. Contribution was not a payment to B, but remained in joint possession, like other partnership property, of A & B. The services were rendered in the joint interest. B not liable without express promise. Page v. Morse, 128 Mass. 99 (1880).

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§137.

An infant may enter a firm, but as he is not bound by his contract of partnership, either to his partners or to third persons, his position as a partner is determined entirely by his property rights.

The contracts of a firm are not binding upon an infant partner.[1] The firm does not acquire by virtue of the contract of partnership a joint title, so as to subject the infant's contribution or interest in the firm fund to the claims of firm creditors. The interest of the infant is always that of a tenant in common, because he is not liable to an account. He may reclaim his share of the firm property at any time on his title as co-tenant, irrespective of the state of account between himself and his co-partners.

There are, however, anomalous cases which enforce an infant partner's contract to the extent of maintaining the co-partner's control over the infant's contribution, and subjecting his interest in the funds of the firm to its debts.[2] These cases proceed upon the notion that the partners hold the firm property by a

joint title as in ordinary cases, and that the infant having invested his co-partners with this joint title cannot afterwards dispute his own act. But an infant's deed is no less voidable than his promise. His act creating a joint title can have no greater validity than his assent to a joint contract. For this reason he may rescind the partnership contract and reclaim his portion of the partnership property at any time, without waiting until he has attained his majority.[3] If the firm could retain his contribution until he reached majority, his act during the interval would be binding, not voidable. If at majority an infant does dissolve the partnership, and reclaim his contribution, this cannot be distorted into an affirmance of the relation, even though he receives from his co-partners a payment as profit for the use of his contribution.[4]

His claim to recover the premium paid for admission into a partnership stands upon a different footing. In such a case his position is that of a buyer. He pays the price of a valuable privilege and enters upon its enjoyment. Having thus received the consideration he cannot reclaim the price.[5] In the contract between the parties it is not contemplated that a premium for admission to the partnership shall be paid back;[6] but a partner always retains a qualified ownership of his contribution, and has the right to re-take it upon a distribution. The rights of an infant with respect to his contribution resemble his right to a sum of money paid as a deposit to secure his performance of a contract. He may disaffirm the contract and recover the sum deposited. He has never in reality parted with title to the deposit.

1. *Infant partner not bound by firm contract.* A, aged 19, went into partnership with B & C. Within a year, he sold out his share to B. D, the holder of notes given by the firm while A was a partner, recovered judgment, and levied on A's property. A obtained injunction.—Maintained. Vansyckle v. Rorbach, 2 Hal. Ch. 234 N. J. (1847).

2. *Infant partner bound by assignment of firm property.* B was infant partner in a firm which assigned for creditors. He affirmed the deed at majority. A claimed, as firm creditor, to set aside assignment, because infant's privilege to disaffirm equivalent to a reservation, and avoided the deed.—Disallowed. 1. No reservation in the assignment. 2. B's privilege personal, and he had affirmed. 3. Assignment of firm goods valid without confirmation, because only separate property of firm infant exempted from execution. Yates v. Lyon, 61 N. Y. 344 (1874).

Advance chattel mortgage executed by infant partners is ratified by receipt of advances after one attains majority and passes, at least, his interest. A & B, minors, were in partnership as provision dealers. They executed a chattel mortgage for meat already bought, and for purchases to be made. Most of the meat was delivered after B's majority, and $50 was paid on account. Firm dissolved, and B sold out his interest to A. Mortgage foreclosed, and A replevied the goods.—Judgment for defendant. B ratified the mortgage, by receiving the consideration, which was executory, after he became of age, when he had the capacity to bind the firm by a chattel mortgage. B's confirmation of the mortgage made it pass, at least, his interest in the property, and deprived A of the exclusive right of possession necessary to maintain replevin. Keegan v. Cox, 116 Mass. 289 (1874). The above decision might be sustained upon the point of procedure.

3. *Supra* § 136, n. 4.

4. *Infant does not ratify partnership by enforcing payment of note for contribution and share of profits given on dissolution of partnership during minority.* B, minor, contributed $900 to partnership with C, adult. B & C dissolved before B's majority. C gave B note for $1,000, secured by mortgage in full for B's contribution and share in the profits, and agreed to pay the firm debts. Subsequently B became insolvent. After majority, B proved for $1,100 against his estate and foreclosed the mortgage. A, firm creditor, sued B & C. B's defence: Minority. Reply: Ratification.—Judgment for B. Dana v. Stearns, 3 Cush. 372 Mass. (1849).

5. *Infant cannot recover premium for admission to partnership.* A, infant, paid $2,900 premium for admission to partnership with B & C., remained in firm for more than one year, until firm failed, and then, being still a minor, disaffirmed, and held B & C for premium.—Judgment for B & C. Adams v. Beall, 8 A. Rep'r 664 (1887).

6. *Partner purchasing interest in business not credited in account with price as a contribution.* By articles, A put $1,000 as capital in B's restaurant, $500 down, balance to be retained by B out of A's share of profits. A brought account. B contended that the money was the price paid him for a half interest in the business, for which payment A was not entitled to credit in account as a contribution. The books showed no credit to A for cash payment, and no charge against B for sums subsequently taken from profits.—Dismissed. Evidence competent to show mistake in articles. Isles v. Tucker, 5 Duer 393, N. Y. (1856).

§138.

A married woman, except where she is exempt from her common law disability, cannot contract as a partner.

If a married woman replaced her husband as a partner she could maintain account. Though a trustee for husband, she is entitled to a partner's rights and interest, subject to the execution of his separate creditors.[1]

If a married woman is a partner her husband could not testify where interest excludes a witness. The husband is identified with his wife in interest and is disqualified.[2]

A husband is liable for his wife's ante-nuptial partnership debts, although he does not acquire her personal property by marriage.[3]

A husband can trade as the agent of his wife and his minor son. His prior creditors cannot claim payment out of the firm assets. The wife would be entitled to her goods, and the father need not make the minor son account for his profits in order to pay the father's creditors.[4]

The ratification by a married woman after discoverture relates back, and validates all the transactions of the firm.[5]

1. *Married woman may act as partner for her husband.* B & C traded as B & Co. C retired, and A, his wife, took his place. She brought account.—Maintained. Trustee for C, who should sue. As C was the real partner, his separate creditors might seize A's interest in the firm. A, being liable as ostensible partner, entitled to a partner's rights. Bitter v. Rathman, 61 N. Y. 514 (1870).

Wife may compete with husband's firm creditors. A advanced £500 from her separate estate to her husband, B. Firm B & C used and gave firm notes for it. A proved against firm.—Allowed. 45 & 46 Vict., c. 75, s. 3, which excluded wife's proof if loan to husband for trade, or business carried on by him, or otherwise, did not apply if husband used as partner. In re Neff 19 Q. B. D. 88 (1887).

2. *Husband of partner incompetent witness.* Suit against A. B, a married woman, was his dormant partner. B's husband, an employee of A, was admitted to testify. A objected, and brought bill of exceptions.—Error. Jackson v. Miller, 1 Dutch. 90, N. J. (1855).

3. *Husband liable for wife's ante-nuptual partnership debts.* B, a married, and C, a single woman, contracted, as partners, a debt to A, for merchandise. D married C, and A sued B, C, and D.—Recovered. D liable for C's ante-nuptual partnership debts. Alexander v. Morgan, 31 Ohio St. 546 (1877).

4. *Husband agent for wife; son infant partner.* B, insolvent, bought stock, as agent for C, his wife, who relinquished dower in payment. B traded as her agent for four years, then joining his son, D, 19 years old, as partner, traded two years, when they stopped. A, prior separate creditor of B, brought account for B's share, claiming: 1, Assets; 2, D's services belonged to B.—Dismissed. C could trade and make B her agent. B could emancipate D, who ratified partnership after age. Assets belong to creditors of the business, profits to B & D. Penn v. Whitehead, 17 Gratt. 503, Va. (1867).

5. Everett v Watts, *supra* §69, n. 20.

CHAPTER IX.

THE LIABILITY OF A PARTNER.

§139.

A partner must answer for the tort of his co-partner committed in the course of the business.

He is liable for the damages caused by the tort. The transaction must be one which the partner may perform in the business. Securities pledged with a firm, but withheld by a partner for his independent account, charged the co-partners for the conversion.[1] The partner received them for the firm; which was bound to restore them upon payment of the debt for which they were pledged. The partners are bound

by a co-partner's receipt, although given for merchandise which was not delivered to the firm, if money has been lent upon the faith of the representation.[2] A gambling contract prohibited by law cannot be enforced by the partners, although the co-partner made it in the course of the business.[3] A partner who issues execution on a firm judgment charges his co-partners, if its enforcement is an abuse of legal process.[4]

The conversion of another's property by a partner to the use of his firm resembles a loan, in this respect, that it adds funds to the firm capital, and, therefore, a loan is said to underlie the tort. The innocent partner, who receives the benefit of the misappropriation, is, on this ground, charged for the property upon an implied contract.[5] Wherever the damages recoverable for a tort are assimilated to the damages for a breach of contract, the identity of the transaction is assumed. The confusion has been already pointed out (§ 48, n. 2).

1. *Partner retaining securities for debt of customer to different firm, of which he had been a member, charges co-partners for the conversion.* A, the assignee of D, brought trover against B and C, trading as B & Co., for the conversion of six promissory notes, drawn by various persons in favor of D. The notes had been deposited with B & Co., by D, and were to be delivered up when certain goods were deposited in their stead. Demand was made on B alone, C not being present, and he refused to give them up, although the goods had been deposited. At the trial it appeared that B had formerly been a partner in the firm of E & B, and that as a balance was due that firm from D, B claimed a right to retain the notes. C requested the Court to charge the jury "That if they believe * * * that [B] detained the notes "* * * on behalf of [E & B], and not in behalf of B & Co., C is not "liable," but the Court said: "The law is not so, but just the con-"trary. The defendants being partners, and the notes in question "having been delivered to [B] for purposes connected with the busi-"ness of the partnership, the conversion of one was, in point of law, "the conversion of both." Verdict and judgment for A.—Affirmed. Nisbet v. Patton, 4 Rawle 120, Pa. (1833).

2. *Partner's fraud in giving receipt for merchandise not delivered, estops the firm against one who lent on the faith of the misrepresen-*

tation. B & C, partners in an elevator. B gave D receipts for grain never delivered, and went with D to A, and represented to A that the grain was on hand, whereupon A lent D money on the receipts. A sued B & C for the grain, or its value and damages. Defence: B had no power to give fraudulent receipts. He could no more enlarge his power than create a power by representation. Trover would not lie for grain which had no existence.—Recovered. B's representation not on the point of his power. He misrepresented the external facts on which a lawful exercise of his power depended. The facts were within the scope of his authority. B & C estopped from objecting to a count in trover by the representations made. Dissent: Unless trover could have been brought, B & C not bound by estoppel. No conversion of property, which complaint alleges has no existence. Griswold v. Haven, 25 N. Y. 595 (1872).

3. *Firm cannot recover on contract for an illegal consideration.* B employed C, partner with D in the commission business, to buy options in grain, under an agreement that B should take no grain, but settle with C for the differences. C dealt for the firm according to the trade custom, but D had no knowledge of the transaction. B lost, and settled with C & D. by giving them the note of a third person made to him, and by guaranteeing its payment, which note they endorsed to A, before its maturity, and he sued B on the guaranty. Defence: Illegal consideration for the guaranty.—Recovered. Partner's want of knowledge did not make consideration legal. Tenney v. Foote, 95 Ill. 99 (1880).

4. *Firm liable for partner's tort in enforcing a void judgment.* B mortgaged a horse to A, who let B retain possession. Firm C & D obtained judgment against B, which was void, on account of the judge's consanguinity with C. C directed sheriff to levy on the horse. A sued C & D for the conversion. Defence: Tort, if any, was C's alone.—Recovered. C was acting for the firm. His wrong was the act of both, and incident to the exercise of his authority to collect the debt by legal process. Chambers v. Clearwater, 1 Keyes 310, N. Y. (1864).

5. Guillou v. Peterson, *infra* § 141, n. 1.

6. *Innocent partner liable for co-partner's tort if founded on contract.* A employed firm B & C, physicians and surgeons, to set his leg, and sued them for C's negligence in performance. B demurred.—Action lay against both. C's tort in firm business charged B, because founded on contract. Whittaker v. Collins, 34 Minn. 299 (1885).

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§140.

If the firm is merely the occasion for a partner's tort, but not the agency in its commission, the co-partners are not liable.

If money is left with solicitors for investment at their discretion, and one of them embezzles it, his co-

partner is not liable for the amount, because custom does not justify an investment by solicitors, except with the lender's approval, upon submission of the investment to him.[1] A partner who takes advantage of his position, and induces a customer to withdraw his claim from the firm, and entrust it to him, will act, in collecting it, as an individual. His tort in dealing with the claim will not charge his co-partners.[2]

The partners define the limits of the business, which they undertake, and each partner in transacting the business acts for all.[3] If he commits a tort while acting within the scope of the business, he charges his co-partners, who take the risk of working with a human instrument, imperfect in its moral quality, and are affected by the imperfect quality of their agent. The test is: Was the tort committed in the prosecution of the business?[4]

The libel by a newspaper, for example, hardly admits of explanation. It is not necessary for the paper to be a vehicle of calumny in order to charge the proprietor for a libel by the editor. The collection of news is the business, and the choice of material is the editor's function.[5]

1. *Firm of solicitors not liable for embezzlement of money left with a partner for investment at their discretion.* A became possessed of £3,000, £1,300 of which she advanced to B & C, who were in partnership as solicitors, to be invested by them in the mortgage of an advowson. They signed a written undertaking to execute a legal mortgage of the advowson to her when the transaction should be completed. A, subsequently, handed the remaining £1,700 to C, on the representation by him alone that it would be invested in the mortgage of real estate. B died. A was fraudulently induced by C to constitute him, by deed, sole trustee of the £3,000, with power to invest it as he thought proper, without being answerable for any loss. No legal mortgage of the £1,300, but it was paid off to C under the authority of the deed of trust, and with the £1,700 (which C had never invested), was spent by C. C paid A interest on the funds until he died insolvent. A then filed a bill against the executors of B and C.—B's estate liable for the £1,300. In regard to the £1,700, Sir R.

MALINS, V. C., said: "It is clear that one partner has no authority "to bind the other partners by borrowing money, unless it is bor- "rowed in the usual course of business, and for business purposes. * * "The payment of the sum of £1,700 to [C] was altogether out of the "ordinary course of business, and the partner cannot * * * be liable for it." It was not the custom of the business to receive funds for investment at the discretion of the solicitor. Plumer v. Gregory, L. R., 18 Eq. 621 (1874).

The plaintiff, who seeks to charge the innocent partners, must make out that the business of solicitors has been enlarged, so as to include that of a scrivener, or that they were aware of the transactions.

Solicitors' business not embracing custody of bonds, partner's taking charge of them, though ostensibly for partnership, does not charge co-partners, unless they authorize such extension of business. B, C & D, solicitors in partnership. A, executor of E, deposited bonds with B, who accounted for them during life of E's widow, and dealt with beneficiaries. B absconded, having misappropriated the bonds. C died. A sued D. Evidence showed that B used his position in firm to deal with the beneficiaries, but not that the partners enlarged the range of the business to authorize B to take charge of the bonds. —Judgment for D. Cleather v. Twisden, 28 Ch. D. 340 (1884).

2. *If partner induces customer to withdraw securities from firm and let him make investment, co-partner not charged by his embezzlement of proceeds.* B, C and others were partners in the banking business. C advised A, customer, to sell some Dutch stock, telling her the firm could procure for her better security, and that he had one in view. He said the money was, in fact, wanted by his own son who was in trade. A sold the stock, and paid the money into the bank, giving C a check to draw it out and invest it. He drew it out, misapplied it, and absconded, the interest having been regularly carried to A's account in the meantime in the books of the bank, but by whom did not clearly appear. All this took place in the banking-house, and A had no acquaintance or dealings with C, except as a banker and member of the firm. C's co-partners did not appear to have known of the transaction at the time they took place, but they did before C absconded. A filed a bill against B and others to render them liable for the amount embezzled by C.—Bill dismissed. Bishop v. The Countess of Jersey *et al.*, 2 Drewry 143 (1854).

If partner collects note for stranger, conversion of proceeds does not charge the firm. A sued B & C for promissory note sold firm. Defence: Note given B for collection, and B was not firm's agent in the transaction. Judge requested to instruct jury: If B received note for collection, his conversion of proceeds to his own use did not charge the firm.—Error not to give the instruction. Linn v. Ross, 1 Harr. 55, N. J. (1837).

3. *Partner liable for co-partner's tort within scope of business.* B bought, of A, tobacco for firm of B & C, and gave note of a third person, which he fraudulently represented to be good. C, learning the fact, failed to disown it. A brought case against B & C for deceit.—Recovered. C liable in case or assumpsit. Moreover, C's failure to disavow made him a party. Hawkins v. Appleby, 2 Sandf. 421, N. Y. (1849).

Partner individually liable for co-partner's fraud. B & C, solicitors, in partnership, with separate places of business. B absconded

with funds received in his branch of A for investment. A proved against firm in bankruptcy. C obtained his discharge. A sued C for the debt.—Recovered, because debt arose from fraud. Cooper v. Prichard, 75 L. T. 91 (1883). Criticised, because C's individual fraud. do. 95.

Solicitors charged by partner who misrepresented that he made specific investment for customer. B and C were in partnership as solicitors. C represented to A that a sum of money which A had paid into the joint account of the firm for the purpose of investment, had been invested in the selected mortgage. Afterwards B & C dissolved partnership, and A's account was transferred to C. C became bankrupt, and A found that, though C had regularly paid interest on the money, the investment had not, in fact, been made, but that C had appropriated the money to his own use. A filed a bill against B to make him liable for the sum. Defence: That B was ignorant of the transaction, and had never derived any benefit from it.—B liable. COTTENHAM, L. C.: "Whether the defendant knew of the "transaction or not, he certainly had the means of knowing it. But "neither is necessary; for the duty of laying out the money was in "the ordinary course of the business of the firm; and they had un-"dertaken it. * * * The misrepresentation was, probably, made for "a fraudulent purpose; but the consequence is a merely civil liability; "and as one partner may certainly bind another as to any matter within "the limits of their joint business, so he may by an act which, though "not constituting a contract by itself, is, in equity, considered as "having all the consequences of one." Blair v. Bromley, 2 Phil. Ch. 354 (1847).

Co-tort feasors are liable jointly, separately and successively without reference to partnership.

Fraud charges culprits with absolute liability. A sued B & C for sum in excess of settlement made between them for sales of land effected through their joint executions, on the ground that items in account were fraudulent. The fact denied and not partners—Judgment for A. Liable *in solido*, if not partners. Baldy v. Brackenridge, 2 S. Rep'r 410, La. (1887).

Partner and stranger liable jointly for fraud on firm. B invested funds of B & C in land for his own account, and conveyed to D, an accomplice, and under circumstances of fraud, by D upon B. A, executor of C, sued B & D, jointly, to recover the money of B and the land of D.—Judgment for A. D's fraud upon B immaterial, but both join in upholding a title which is a fraud on C. Wade v. Rusher, 4 Bosw. 537, N. Y. (1859).

4. *Newspaper firm liable for libel published by editing proprietor.* Partners published newspaper, which reported a church trial, and libelled the clergyman, who sued them. Innocent partner liable, because libelling, though not a necessity, an incident to the business. Lothrop v. Adams, 135 Mass. 469 (1882).

Partner's libel must grow out of firm business, or will not charge innocent co-partner. A returned a table because unsuitable to B, C & D, trading as a furniture company. The table was exposed in front of the shop, with this placard: "Taken back from" Dr. A "who could "not pay for it; to be sold at a bargain." A tore the placard off, but another was put up, which substituted "would" for "could," and added: "Moral: Beware of dead-beats." A requested B, in D's presence, to remove the placard, and D replied, that the man who placed it there had gone to dinner. A sued B, C & D. Court directed

verdict for defendants.—Reversed. Sufficient evidence against B and D for jury. Libel not sufficiently connected with business to charge C. Woodling v. Knickerbocker, 31 Minn. 268 (1883).

This libel might be treated either as an advertisement which might induce customers to stop and buy the table, which, on account of the personal incident recounted, would be sold cheap. Or the libel might have been a personal spite, and not for the purpose of effecting a sale of the table. The Court took the latter view, and refused to charge the innocent partner for the venom of his co-partner.

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§141.

Trust funds put by a partner in his firm charge his co-partners for the misappropriation.

The *cestuy que trust* may waive the tort and proceed in assumpsit.[1] Where the tort of a partner consists in the unlawful appropriation of the property of another, the defrauded party's primary right is for restitution. The Common law actions were originally designed to give effect to this primary right, but they became, in time, a medium for the recovery of a money compensation. The modification of the process changed the right and enlarged the opportunity for recovery. The whole estate of the tort-feasor might be taken to compensate the owner of the misappropriated property. An action to enforce a personal and unlimited liability has taken the place of a proceeding to recover the possession of specific property. The equitable rule for following trust funds, is a survival of this natural and primary right of restitution. A right of restitution can not be made available except against the property itself, or a fund into which it has passed. When a

partner has made a misappropriation of a stranger's property, and an attempt is made to hold the firm liable, if the plaintiff asks for restitution, he can enforce his right only against that fund which was increased by the misappropriation, that is, the firm assets.[2]

If, on the other hand, the plaintiff is entitled to compensation at the hands of all the partners, this liability charges their separate estates as well as the firm funds. But the co-partners are protected in their separate estate from the owner's demand for restitution. The individual estate was never contributed to the firm stock, and remains the individual property of the co-partners. They are in a better position than a purchaser for value without notice, as they do not require any aid to fortify their title. It is the dominion of an independent proprietor who has an absolute right at law. To expropriate them, would be a fraud without any palliation. Equity recognizes the separate estate as unconnected with the firm, and allows no claimant to come upon it, unless he can establish a liability of the proprietor. A firm contract does create such an obligation, but only to the extent of the partner's agency. The liability for restitution of misappropriated property is not charged against the innocent partner, unless the fund can be traced to his possession, though he may be charged in his individual capacity, with damages, for the tort of his co-partner.

As soon as the obligation was recognized at law, that compensation should be made, instead of restitution, there was no way to limit, by means of the Common law actions, the claim to recovery from the firm estate.

If there were no separate creditors, the firm creditors might proceed against the separate estate, and the *cestuy que trust* might obtain the firm assets. He might proceed first, or he might exclude the joint creditors, by claiming restoration, or an equivalent in value, before allowing their claims. The effect would be to throw them upon the separate estate for satisfaction. Indirectly, the *cestuy que trust* would be reimbursed out of the separate estate, to which he could not resort directly. If restitution in full were made, the separate estate would be charged with that amount, at the suit of the firm creditors, from whom it had been taken away. If the *cestuy que trust* received only a dividend, the joint creditors would be thrown upon the separate estate for the rate, instead of for the principal. In either event, the separate partner would pay the joint creditors what they had lost by the reclamation of the *cestuy que trust;* who might, therefore, be allowed, so far as the partner is concerned, to resort to the separate estate in the first instance. To the separate creditor it makes no difference, for he excludes the joint creditors until he is satisfied, in any event.

1. *Cestuy que trust may sue innocent partner in contract for trust funds converted by trustee partner to firm use.* B, of Philadelphia, and C, D and E, of New York city, entered into a special partnership in November, 1866, as C, D & Co., to transact in New York the business of buying and selling stocks on commission, making loans, collecting promissory notes, drafts, and bills of exchange. In November, 1871, by an omission to publish, B became a general partner, according to New York law; though both he and his partners thought him a special partner only. B carried on in Philadelphia a business of his own. D was also executor of the executor will of F, and as such received bonds, etc., of great value. The partnership agreement stipulated that the general partners should not enter into speculations of any kind. C, D & F, nevertheless, did so without B's knowledge; and D, with the approval of C and E, used, in speculations, securities belonging to F's estate. The speculations resulted in the insolvency of the firm, and the securities were used to pay the losses. B

did not know that the trust property had been used, till the failure of the firm; but he did know of a loan of securities which had been, on another occasion, made by D to the firm. A, the administrator *c. t. a.* of the estate of F, brought assumpsit against B, C, D and E. B alone was served. In the court below, judgment of non-suit. In the court above;—Judgment reversed, and *procedendo* awarded. The question was whether there was sufficient evidence to entitle the case to go to the jury. C, D and E were clearly liable upon the facts. PAXSON, J.: "It remains to consider the question of [B's] liability. "The right of the plaintiff to waive the tort, and sue in assumpsit for "money had and received, is too well settled to need either argument "or the citation of authority. It is alleged, however, that [B] is not "liable, for the reason, among others, that 'by the terms of the part-"nership articles, he was liable only to the extent of the capital he "had contributed, and the terms of these articles were known to [D] "when the securities were delivered for use.' * * [D] was not act-"ing for his *cestuy que trust* when he loaned these securities to his "firm, * * and they are not to be affected with his knowledge. * * "It is said, however, that [B] is not liable, for the further reason "that the power of one partner to bind the others is, at most, an "implied power; that each partner is the agent of his co-partners "only when acting in the scope of his power, and in the usual course "of the business of the firm; and that when his agency is denied or "forbidden by his co-partner, with notice to the party assuming to "deal with him, as agent of the firm, his act is not that of the firm, "but his individual act only. As an abstract principle this is correct. "* * * It does not apply to this case as it stood before the jury when "the judgment of non-suit was entered. The cause has been argued "upon the theory that the securities were borrowed for the purpose "of using the money in wild speculations prohibited by the agree-"ment of partnership. The evidence is not so. The money was "used in the business of the firm, carrying stocks for their custom-"ers, etc. * * * Our own books are meagre in authority upon the "question of the responsibility of a firm under such circumstances. "It has been largely discussed in England. * * * It was attempted "to distinguish the English cases from the one in hand. * * * I am "unable to see the distinction. The wrong done here on the part "of the firm was in converting the securities. It is manifest that "they had the custody of them for [D], and collected the interest "and dividends for him. Afterwards they borrowed the securities "from [D]. This did not authorize their conversion. It imposed "an obligation to return them in specie. If sold, it was the duty of "the firm to have carried the proceeds to [D's] credit as executor. "[But they were used to pay debts for which B, as a general partner, "was liable.] It is entirely in the course of the regular business "of the firm to pay its own debts. * * * Here, the securities belong-"ing to the estate were sold by the firm, with knowledge of the true "ownership, and the proceeds used to pay its debts. This * * * "would make [B] liable without notice or knowledge on his part of "the borrowing of the securities, or their conversion by his partners. "But even if we treat [B] as a special partner, so far as [F's] estate "is concerned, this judgment must be reversed. * * * [For] he knew "in April, 1868, that his firm had borrowed $28,000 of the securities "* * * from the executor. * * * [Such knowledge] was ample to "put [B] upon inquiry as to the nature of the transactions of his "firm, and if he chose to sleep upon such a disclosure, he has no "one to blame but himself. * * * We are of opinion that the case

"should have gone to the jury." Guillou v. Peterson, 31 Leg. Int. 112 (1874); 8 Norris 163, Pa. (1879).

2. *Partner's tort charges innocent co-partner who shares the proceeds.* A & B, merchants in Rochester, were in the habit of consigning merchandise to C & D, commission merchants, in N. Y. They also gave commercial paper, which C & D used and met with proceeds of consignments. C wrote to A without D's knowledge that $16,000 worth of A & B's paper, which was, in fact, outstanding, had not been used, because payable at C & D's office, and asked for additional notes payable at bank to meet indebtedness of A & B in current paper. C & D, after negotiating the notes and using the proceeds in their business, failed, and were discharged in bankruptcy. A & B sued them for tort in procuring the notes which A & B were compelled to pay.—Recovered. C's fraud charged D for damages, and bankruptcy discharge did not extinguish the liability. Strang v. Bradner, 114 U. S. 555 (1884).

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§142.

A special partner, who becomes a general partner by neglect, is also liable when the firm, by its negligence, is guilty of a tort.

He ought to have complied with the requirements of law, and cannot set up his dereliction of duty as a protection, for that would be to take advantage of his own wrong. If the double negligence releases him from liability, the second tort does not aggravate, but neutralizes, the first. The taking no part in the business does not exonerate a partner, for then a dormant partner would escape liability for torts committed by the firm. The principal answers for the discretion which he has given his agent. This is the test of liability in contract, as well as in tort. How can the law, which makes the special a general partner, release him from the liability of a principal? The liability for each other is the ground-work of partnership. Take away the solidarity, and no partnership exists. He would be a scapegoat, says Judge

THOMPSON. Isn't that the office of a partner? To bear the sins of his co-partner, rather than visit them upon innocent strangers? The law makes him a general partner from the time he fails to comply with the requirements which secured his protection.

The liability for tort may be independent of title. Take a kind of tort which creates no increase, or benefit, to the joint estate. How is the delict to be brought home to the innocent partner? With no fund to be followed, or equivalent in value to be reimbursed, the factor of title is eliminated, as a test. The liability must be resolved upon the theory of partnership, without the aid of any collateral principle. If committed in the exercise of a discretion delegated by the firm, the tort is charged directly to the innocent partner, as the result of his mandate.

1. *Tort of partner does not charge co-partner who becomes such by construction of law.* In an action for causing the flooding of plaintiff's coal-mine, brought against B, C and D individually, who were carrying on business under a limited partnership, C and D being general partners, and B special partner, it was sought to charge B, by proof, that he had done some act which rendered him liable as a general partner.—But the court decided that as he was not a managing partner, employing workmen and directing their operations, proof of an act having no relation to the trespass sued for, which might make him liable for firm debts, did not establish that trespass against him, or raise the presumption of his assent and consequent liability; and hence it was error to instruct the jury that if the special partner had made himself a general partner, and the act complained of was done by the agents of the firm, and assented to by one of the partners, the special partner was equally liable with the other, and the verdict must be against both. McKnight v. Ratcliff, 8 Wright 156, Pa. (1863).

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§143.

A partner is liable criminally for his misappropriation of firm property.

At the Common law he was not liable criminally for the misappropriation of firm property, because he was a co-proprietor, and clothed with the title. A man could not steal from himself. Recent statutes have made the fraudulent misappropriation of firm property, or misuse of firm credit by a partner, a crime, punishable by fine and imprisonment.[1]

1. 31 & 32 Vict., c. 116, §. 1, 1868. *Supra* § 16, n. 1. Act of Pa., 3 June, 1885, P. L. 60.

CHAPTER X.

CHANGE OF PARTNERS.

§144.

Acts done previously by the firm do not charge the incoming partner, nor could he ratify them, because they were not done on his behalf.

The firm was not his agent at the time. Joining the firm and carrying out its previous contracts do not create any liability to the promisees or creditors of the firm.[1]

If the firm contracted for an engine, and the incoming partner inspected and joined in accepting it, he would not be liable for its price. There would be no implied contract, for the express contract excludes it, and the delivery was made upon the express contract to which he was no party.[2] The incoming partner may be charged upon,[3] or may enforce,[4] a severable

contract of the firm. A new contract might be implied. If the plaintiff agreed to supply A with bricks at so much a thousand, and B went into partnership with A, B might be held liable for the bricks subsequently delivered, because, although the rate was fixed by the original contract, each purchase would be a distinct contract.[5]

The incoming partner makes himself liable for the prior debts of the firm only by an agreement with its creditors, and for a consideration. Entering the firm does not charge him, and an agreement with the partner does not enure to the creditors.[6] An incoming bought out a retiring partner in a newspaper, and suit was brought for paper supplied before and after his entrance into the firm. Payments had been made on the aggregate debt. The incoming partner was not liable.[7]

1. *Incoming partner not liable for contract of his predecessor.* A & B agreed to sell D all the feed, bran, shorts and screenings made at their mill during one year. B sold out during the year, to C. D paid for feed, &c., delivered by A & B. Afterwards, A & C stopped delivering, and sued D for price of feed, &c., so far delivered by them. Defence: Failure to complete contract.—Judgment for A & C. Contract severable according to consideration. D's counter-claim for breach of contract is against A & B. Parmalee v. Wiggenhorn, 6 Neb. 322 (1877).

2. Helsby, v. Mears, 5 B. & C. 504.

3. *Incoming partner liable on implied contract for debts subsequently accruing under express contract which is severable.* A granted a license to a firm, reserving royalties. Afterwards, B entered the firm. A sued the firm, including B, for royalties subsequently accruing.—Recovered. He was not bound on the express contract, but having received the benefit of the consideration, he is liable upon an implied contract, which corresponds to the terms of the express contract, for the benefit which he has derived. Rogers v. Riessner, 30 Fed. Rep'r 525 (1887).

4. *Incoming partner cannot sue on specialties previously given to the firm, but may sue on parol renewal.* A & B, partners, 1877–8, insured their stock in company D, by two policies, for one year. No. 1 contained a covenant for perpetual continuance on payment of annual premium. No. 2 had no covenant for continuance. Afterwards, A & B paid the premiums for renewals until 1882, when C entered the firm, which continued to pay the renewal premiums until

1886, when the loss occurred. A, B & C sued D in assumpsit for the loss.—Recovered for loss under policy No. 2, because each renewal was by parol, and enured to the firm which paid the consideration. Judgment for D under policy No. 1, because continued as a specialty by its own terms. Firemen's Ins. Co. v. Floss, 10 A. Rep'r 139, Md. (1887).

5. *Incoming partner charged on new contract implied on severance of running contract with firm.* A, in 1847, agreed with B to supply him with bricks whenever he wanted them, for 28*s*. per 1,000, ready money. In 1848, B and C became partners; and after that, B, from time to time, ordered bricks of A, which were used for partnership purposes. A sued B & C in debt for goods sold. B suffered judgment by default. C pleaded *nunquam indebitatus.*—Verdict for A. ERLE, J.: "If this had been a contract with the defendant B to supply him "with a certain number of bricks at so much per thousand, that would "not make a subsequent partner liable; but this is only that in all " future contracts the bricks shall be charged at 28*s*. ready money. "Every order is a new contract." Dyke v. Brewer, 2 Car. & K. 828 (1849).

6. *Firm creditors cannot enforce the contract of incoming partner to pay the debts of the firm without becoming parties to the contract and giving a new consideration.* A & B, partners, bought of C & D, a one-quarter interest in their plaster mill and quarries by a contract in writing, which contained provisions declaring that A & B became partners of the old firm of C & D, and were bound for one-fourth of its debts. The creditors of the old firm, C & D, threatened to sue the four upon note of C & D. A & B brought bill against C & D and their creditors to reform in contract, upon the ground of mistake, by striking out the provisions mentioned, and to enjoin suits by the creditors.—Decree, as to reforming contract. Creditors were not parties to that contract, and it was not made for their benefit, though they might sue if they could prove partnership of the four. The written contract would be only evidence, and the parties made it speak the truth. Wheat v. Rice, 97 N. Y. 296 (1884).

7. *Incoming, replacing retired partner, not liable with continuing partners for goods supplied before and after his entrance, though payments had been made on aggregate indebtedness.* B & C, partners in publishing a newspaper, opened an account with A, a dealer in paper. Subsequently, C, by an agreement in writing, sold his interest in the business to D, who therein assumed, and agreed to pay C's indebtedness. B & D continued publishing; and A continued to supply them with paper. The debt of the old firm to A was $194, of the new firm, $36.40. A brought assumpsit against B & D for both bills. D filed affidavit of defence to portion contracted by B & C, and tendered judgment for the $36.40, with interest. At the trial, D asked the Court to charge that he could not be held for any of these items, except those contracted after he became a partner. The Court, however, said that if the jury should find the above facts in reference to the arrangement between C & D, A could recover. Verdict accordingly, and judgment for A.—In error, reversed. A was a stranger to the contract between C & D, and to the consideration. He did not agree to release C, nor to accept D as his debtor. Furthermore, there was no evidence that B & D agreed to be jointly liable for the debt of the old firm. To the present action against them jointly, each might answer: "I did not so agree with my co-defendant." Kountz v. Holthouse, 4 Norris 235, Pa. (1877).

§145.

It appears from the authorities that the necessity of novation is being gradually superceded by the theory of trust and consideration.

The incoming partner has received a fund charged with a trust in favor of outstanding creditors. Having received a consideration for his promise, he becomes himself an original debtor, and his undertaking is not within the statute of frauds, notwithstanding the fact that his assignor remained liable for the debt. The property, treated as a trust fund, subjects him to a direct action by the creditors; treated as a consideration, deprives him of the benefit of the statute of frauds. It must result from this change that when a retiring partner assigns his interest to his co-partners, or to a stranger, upon an agreement to be protected against the debts of the firm, the remaining and the incoming partners are liable to creditors, who have not released the retiring partner. The arrangement, it has been held, creates a trust which stops the statute of limitations.[1] But this last position is untenable, for the trust is not direct and continuing, exclusively cognizable in equity or between trustee and *cestuy que trust*, and, therefore, is within the statute of limitations.[2]

The effect of a partner's retirement without winding up the business is a transfer of his interest and title to the continuing partners.

1. *Succeeding firm's agreement to pay debts charges assets with a trust for old firm creditors.* A, B & C, partners, solvent, but indebted to D. A, in 1877, sold his interest to E, and new firm agreed to pay A $3,500, and pay firm debts and indemnify him. In 1879 firm became involved, and to protect A against D's claim, assigned A securities which he turned over to D. The transfer held an act of insolvency.

A, being compelled to pay D, sued for reimbursement out of assets of original firm.—Recovered. New firm, taking the stock and agreeing to pay debts, made the assets a trust fund for creditors of the old firm. A, therefore, not barred by statute of limitations. Bowman v. Spalding, 2 S. W. Rep'r 911, Ky. (1887).

2. *Trust, unless direct and continuing, exclusively cognizable in equity and between trustee and cestuy que trust, barred by statute of limitations.* B *et al.*, 13 November, 1872, executed promissory note, payable on demand to C, for $2,200. B died, and 29 August, 1877, D took out letters testamentary. A, executor of C, on 15 August, 1884, without prior notice, cited D to file his account, and upon its confirmation and appointment of auditor to distribute the balance of $5,088.55, which widow, as distributee, had received, presented the note. Defence: Statute of limitations.—Claim barred by six years. Fund in administration not a technical trust. York's Appeal, 17 N. Y. 17, 33, Pa. (1886).

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§146.

The retiring partner remains bound to the firm creditors until they release him.

So far as the personal obligation of the retiring partner is concerned, a novation is always necessary in order to relieve him. The liabilities of the firm represent the rights of third persons, and they, and not the debtors, are the proprietors, whose consent is essential to any modification of claims against the firm. The retiring partner may assign his interest to his co-partners, and had he incurred no debt by reason of his share in the partnership, the assignment would be simply a transfer of property. But he has incurred debts while a partner. The creditor has the right of dominion over his claim, and he may agree to the transfer and novation, which give him a different debtor in the place of the original firm. An exchange of debtors would be sufficient consideration to sustain the creditor's contract to

make the substitution. The agreement between the partners does not control the creditor. He is the master of the situation. The termination of the partnership does not affect him or disturb past transactions.[1] The dissolution relates only to the future. The law raises no presumption that the creditor discharges a retiring partner's liability. The fact must be made out. Taking security, unless it merges the debt, might be collateral. The taking as satisfaction must be proved. The retired partner is released if the creditor accepts a new partner as debtor in his stead.[2]

The creditor does not release the retiring partner unless he accepts the continuing firm's obligation as a substitute. The creditor who takes the note of a new firm trading under the name of the old, does not release the retiring member, unless he knew of the change, and meant to substitute the new for the old obligation.[3]

1. *Partners remain liable after dissolution on contracts made during the partnership.* B & C, partners, received A's goods to sell on commission. B retired, and C sold the goods. A sued B & C for the proceeds.—Judgment for A. The joint undertaking preceded dissolution, and was not discharged by it. Briggs v. Briggs, 15 N. Y. 471 (1857).

2. *Firm creditor's acceptance of new partner's obligation, releases retiring partner.* B & C, partners, indebted to A. B assigned to D, who assumed the firm debts. A assented to the novation, and afterwards sued B & C. Defence by B: Release.—Judgment for B. Novation sufficient consideration for release. Loucks v. Martin, 9 A. Rep'r 279, Pa. (1887).

3. *Retiring partner liable until notice given.* B & C owed A, when C, Sr., retired. B formed partnership with C, Jr., under same name of B & C. A, without notice of the change, took a note of B & C in satisfaction. He sued B & C, Sr.—Recovered, because no notice. A question to witness: Was it note of new or old firm?—Inadmissible, because a mixed question of law and fact. Hervey v. Van Pelt, 4 Bosw. 60, N. Y. (1859).

Partner by estoppel not bound by co-partner's admissions. B C, D C, & E C, traded as C & Co. B C retired. Remaining partners continued the business as C & Co. A, an old customer, who had no no-

tice of B C's retirement, sued the three for a debt subsequently incurred, and offered the firm books in evidence. Objection that B C was not a partner when entry made, and, therefore, not bound by it. —Objection sustained. Pringle v. Leverich, 97 N. Y. 181 (1884).

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§147.

The liability of the retiring partner for the outstanding debts of the firm is the foundation of his right in equity to prevent the continuing partner from diverting the assets, and not leaving enough to meet the debts.

His equitable lien is an implied term of the sale.[1] He proceeds to enforce the original destination of the firm stock by bill on behalf of himself and of the creditors.[2] The firm creditors have a right to follow the fund in the hands of the new firm, but they have no priority over the creditors of the new firm. On the other hand, the creditors of the new firm have no priority over the creditors of the old firm, notwithstanding the change in the title. Both sets of creditors share the assets upon an equal footing. The right of firm creditors is not derived through the partners, and hence is not destroyed by a change in the personnel of the firm. For the purposes of their priority, the firm fund, and not the partners, is considered the debtor, and the firm fund remains the same in the hands of the new partners. This fund may become subject to the claims of new creditors in the hands of the new firm, just as it might have done in the hands of the old firm, had there been no change of partners. For this reason the creditors of the new

firm compete with the creditors of the old firm in the distribution of the assets. Neither set of creditors is entitled to priority, because both have the same debtor.[3]

1. *Retiring partner may compel application of assets of firm to the payment of its debts.* A sold out to his co-partner B, a minor. B agreed to pay the firm debts and indemnify A. B refused to pay firm debts on the ground of infancy, and assigned the assets to C, without consideration. A brought bill for injunction, receiver, and to compel the application of the assets to the payment of the firm debts. Defence: Infancy.—Decree. Infant could not retain the property without performing the condition upon which he received the sole title. Kitchen v. Lee, 11 Paige Ch. 107, N. Y. (1844).

Contra. Retiring partner no equity to marshal assets for his relief. Articles of a banking association provided that the assignee of stock and remaining partners should exonerate retiring partners from old debts contracted before or after his assignment. A paid profits and debts against the firm, a few contracted before, but most after his retirement. Other debts were still outstanding, and A brought bill against his assignee and the continuing partners to compel them to appropriate the assets, which were sufficient on his retirement, though subsequently put in the hands of a receiver to pay the indebtedness. —Dismissed. Action at law adequate remedy. Clarke's Appeal, 11 Out. 436, Pa. (1884).

This decision disregards the partner's equity, which entitles him to marshal the assets for the relief of his liability.

2. *Retiring partner must proceed by bill, and not intervene in action between continuing partners.* A sold out his interest in A & B to C, who continued business with B, they to use firm assets in paying old firm debts. C sued B for dissolution and account. A intervened, because B & C insolvent, and assets of old firm not applied according to covenant.—A bill necessary to protect equity of A and old firm creditors. Dayton v. Wilkes, 5 Bosw. 655, N. Y. (1859).

3. *Creditors of old and new firm share the assets pro rata.* B, C & D, partners, indebted to A. D died. B & C continued the business, and became indebted to E. Upon insolvency A claimed the whole fund. E asked to share the fund.—Judgment for E. B & C were bound in equity to apply the assets to payment of A, but the fund was subsequently increased by E's credit, and he is entitled to a *pro rata* share. Filley v. Phelps, 18 Conn. 294 (1847).

§148.

The continuing firm is not an assignee for creditors, unless it becomes insolvent.

Such a construction would contradict the continuance of the business, and imply its winding up.[1] The retiring partner cannot specifically enforce the contract with the continuing partner, who takes the stock and agrees to pay the firm debts. Neither the retiring partner nor the firm creditors have any standing to control the disposition of firm assets until the margin of insolvency is reached, when the disposition would expose the retired partner to the debts provided for by the assets. While the continuing firm is solvent the remedy of the retiring partner at law is adequate, but when insolvency supervenes, his equity will sustain a bill on behalf of himself and of the firm creditors to marshal the assets in ease of his liability.[2]

The continuing partner's agreement to indemnify the retiring partner against firm debts is a separate obligation, collateral to the partnership, and in ease of its liability. The claim for indemnity is subject to the set-off of any indebtedness of the outgoing partner to the indemnifying partner.[3] Any subsequent purchaser from the indemnifying partner, if he assumes the firm debts, becomes liable on the indemnity.[4]

1. *Agreement by purchaser of firm stock to pay firm debts does not make him assignee for creditors.* B, C & D sold out to E. F sued firm, which compromised by each giving individual note for his quota. B paid his note and assigned his claim to A, who sued E, assignee for creditors, on alleged oral agreement to pay firm debts from assets and profits.—Judgment for E. A could enforce an assignment for creditors only by a creditor's bill. Colgrove v. Fallmadge, 6 Bosw. 289, N. Y. (1860).

2. Deveau v. Fowler, *supra* § 106, n. 7.

3. *Bond of indemnity to retiring partner subject to set-off of his individual debt to obligor.* B & C, partners. B had overdrawn his account. C sold out to D, who continued business with B, and took his note for quota of overdraft due to C's account. D bought out B, and gave him a joint and several bond of indemnity against firm debts, with E as surety. D endorsed note to E. B assigned bond to A, who

was creditor of B & D. A sued D & E on the bond, and E set-off the note.—Set-off allowed. The covenant was to B, and not to firm creditors. The note was an individual debt of B, and a proper set-off. Merrill v. Green, 55 N. Y. 270 (1873).

4. *Promise of purchaser of firm assets to pay firm debts not within statute of frauds.* A sold out his interest in firm to B & C for $700, they paying firm debts. B sold out to C, also subject to same debts. C sold to D on same terms. A sued D. Defence: Statute of frauds.—Recovered. Purchase of assets pledged for claim. Townsend v. Long, 27 Smith, 143, Pa. (1874).

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§149.

There must be a new partner to make the novation binding.

The contract of a creditor with the partners to release the retiring, and look only to the continuing partner for the firm debt, is void for want of consideration.[1]

The novation was formerly recognized as having a consideration in the substitution of a several for the joint contract.[2] But now that the joint contract of the firm is held to include the several contracts of the partners, there is no consideration for the creditor, who acquires no additional obligation.

The New York cases present a modification of this doctrine. The retiring partner becomes a surety for the continuing partner, and, by giving creditors notice of the dissolution, and of the continuing partner's agreement to discharge the firm debts, secures to himself all the rights of a surety.[3]

1. Walstrom v. Hopkins, *supra* § 95, n. 5.

2. Wallace v. Fairman, *supra* § 95, n. 3.

3. *Agreement that continuing partner shall pay firm debts, does not make retiring partner a surety unless communicated to firm creditor.* B, C, D & E, partners, took a lease of premises for firm business. D & E retired, and B & C agreed to pay the subsequent rent. Landlord A

was notified of the retirement, but not of the agreement of B & C to pay the entire rent. A took notes of B & C for subsequent arrears, with the understanding that he did not thereby release D & E. A sued B, C, D & E for the rent. Defence by D & E: Agreement made them sureties, and A released them by taking note of B & C.—Judgment for A. Agreement made D & E sureties as between the partners, but not as to A, who was not notified of the agreement. Moreover, the extension was not absolute, but was conditional upon the assent of D & E, which was never given. D & E, therefore, were not released. Palmer v. Purdy, 83 N. Y. 144 (1880).

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§150.

The incoming partner receiving the assets under an agreement to pay the old firm debts becomes liable to firm creditors in a personal action.

The transfer of the firm assets to the incoming partner under an agreement to pay the old firm debts, is in substance a payment to him for the benefit of a stranger; that is, the old firm creditor. This makes the incoming partner a trustee of the assets in the interest of the firm creditor. The trust is enforced at law by an action of assumpsit, which involves the personal liability of the trustee. The judgment obtained against him is for a firm debt, and its primary purpose is to subject the assets in the hands of the new firm to the claims of the old firm creditors. Its secondary effect is to fix an ultimate liability upon the separate estate of the incoming partner, thus accomplishing, by means of the procedure and by indirection, a result which could not have been accomplished directly without proof of a novation, in which the personal obligation of the incoming partner was substituted for that of the outgoing partner, with the consent of the firm creditor.[1]

If the continuing partner indemnifies the retiring partner against scheduled creditors, the indemnity enures to the specified creditors, and the assets are appropriated to their claims.[2]

1. *The transfer of firm assets is a consideration for incoming partner's promise made to firm creditor to pay firm debts.* B, after giving a note to A for merchandise, took C, D & E into partnership, the assets exceeding his debts by $50,000, and they agreed to assume the debts. The firm, in a letter, acknowledged the note as a firm debt, and, later, included it in statement of its liabilities. A sued firm.—Recovered. White v. Thielens, 10 Out. 173, Pa. (1884).

2. *Transfer of assets sufficient consideration for assuming the debts, and this consideration enured to firm creditor.* B & C sold out to stranger, D, who assumed the debts, which were scheduled and deducted from the amount of the assets as a basis of the sale. A, creditor of B & C, sued D.—Recovered. A acquired beneficial interest in the assets by the transfer, and may enforce the promise. Elton v. Perkenpine, 1 E. Rep'r 637, Pa. (1855).

CHAPTER XI.

THE RELATION OF PARTNERS.

§151.

The relation of partnership requires that the partners should act towards each other with the utmost good faith.[1]

The history of partnership shows that the exaction of *uberrima fides* was based upon the closeness and intimacy of the relation (§ 1, § 2). But at the present day the requirement is not founded upon blood, friendship or affection. The partnership does not derive its force from sentiment. The *nexus* of partnership is property, and the interest of the partners springs from and is bound up in the firm estate. The func-

tions of the partners are summed up in the process of buying and selling property (§ 7). In title and in function the partners are identified, and this identification justifies the continued application of the maxim. Each stands for and replaces the other. A partner, therefore, must act in reference to the business for the firm. If he tries to act for himself the law brings his act into consistency with the relation, and makes it enure to the firm.[2] This is the groundwork of the maxim. It is upon this principle that a partner who competes with the firm by transacting business of the same kind on his own account,[3] or makes use of the firm property,[4] or of his position[5] in the firm, to secure a separate advantage is compelled to share with his co-partners the profits thus acquired. But on the other hand, a partner's engaging in a different business, although it might constitute a breach of the articles and furnish a ground for an injunction against the partner, or for a dissolution of the firm, would not entitle his co-partners to share his profits earned in the independent business.[6]

1. Good faith requires a disclosure of all the information possessed by a partner in regard to the business.
Surviving partner's account as trustee for deceased partner's share must furnish exact information of the business condition, or his purchase, based on the account, will be set aside. B & C, partners. Articles provided that, in spite of a partner's death, the business should be continued until 1 May, 1876. B died, 17 November, 1875. A, administrator, brought bill for account, not only up to B's death, but to 1 May, 1876, and averred that in reliance upon C's statement of the value of B's interest, $14,578.85, and of a subsequent depreciation of the stock, he sold out to C for $9,582.32, and that he had discovered that the statement was false. C pleaded a settlement of account after full investigation, and a purchase at A's instance upon his terms, followed by A's recovery of judgment for the price and payment thereof by C.—Plea sustained. Harrison v. Farrington, 15 Stew. 353, N. J. (1885). At the hearing C did not prove such a complete and detailed account as would enable A to understand the exact value of B's share. C told A that the stock depreciated, though inventory increased $4,000 between B's death and 1 May, 1876. C did not know whether this re-

sulted from increase of stock or of values.—Plea not proved. C, a trustee of B's share. 10 A. Rep'r 105 (1887).

One partner's exacting indemnity from another against misconduct of their co-partner without communicating an explained discrepancy in his account, not a breach of good faith. A, B & C, bankers in partnership. C desired to give B the superintendence of the business. A refused, unless C would indemnify him any loss by the act or omission of B. C gave A bond of indemnity. A knew at the time of a discrepancy in the account between the bank and one of its New York correspondents, a matter which B had in charge. A did not know of any fraud, or that this irregularity might not be explained. B misappropriated firm funds, and A sued C on the bond. Defence: Breach of good faith in withholding information of the discrepancy. —Judgment for A. Requiring bond sufficient notice of distrust. Pardee v. Markle, 17 W. N. 211, Pa. (1886).

This decision hardly meets the standard of good faith required of partners in their dealings with each other in reference to the firm business. Each partner is bound to make a clean breast of everything. He is not the judge who can determine the importance of any suspicious circumstance, but must communicate it and not leave his co-partner to surmise the reason for his conduct.

2. *Partner can acquire no separate property in the business which the firm carries on.* B formed a mining partnership in 1874, with C and D, which continued until 1878, he furnishing the capital and they prospecting and locating mining properties. C and D located three mines and certain coal lands, which they reported to B, and bought him out for $400. The day of purchasing his share they consummated a sale of the coal lands, for $1,800. During 1876 and 1877, they discovered four more mines, which they sold, after 1878, for $12,000. A demanded account for his third of the proceeds.—Decree. Entitled to all discoveries made during the partnership. Jennings v. Rickard, 15 Pac. Rep'r 677, Cal. (1887).

3. *Purchaser of article for firm with individual goods must share his profits with co-partner.* A & B were partners, dealing in *lapis calaminaris.* B was a shopkeeper, and paid the miners for the *lapis calaminaris* with goods from his shop. In his account with A, he charged him as for cash paid to the amount of the price of the goods. A claimed that B must divide with him the profit made on the sale of the goods.—Decree. Sir JOHN LEACH, V. C.: "It is a maxim of "courts of equity that a person who stands in a relation of trust and "confidence to another, shall not be permitted, in pursuit of his "private advantage, to place himself in a situation which gives him "a bias against the due discharge of that trust or confidence." It "was B's duty to buy the *lapis calaminaris* at the lowest possible price, but when "he obtained it by barter for his own shop goods, "he had a bias against the fair discharge of his duty to the plaintiff. "The more goods he gave in barter for the article purchased, the "greater was the profit which he derived from dealing in store "goods, and as this profit belonged to him individually, and as the "saving by a low price of the article purchased was to be equally " divided between him and the plaintiff, he had plainly a bias against "the due discharge of his trust or confidence towards the plaintiff." Burton v. Wookey, 6 Mad. Ch. 367 (1822).

Partner competing with firm in supplying meat to government accountable for his profits. A & B agreed to act as partners in obtaining contracts for the supply of provisions for the troops in Ireland. But B made secret arrangements with other persons to share the profits of any similar contracts they might take. A filed a bill, *inter alia*, for an account of the profits made by B from such secret partnerships. B admitted the facts, but denied A's right on the ground that he [B] had never agreed not to enter into such contracts.—Lord Chancellor BRADY concluded thus: "I think, therefore, there are questions "arising on this view of the case which can hardly be satisfactorily "disposed of without further inquiry, and that I should send the "case into the office without prejudicing it as to the length I ought "to go, or saying that the petitioner is absolutely entitled to any- "thing in respect of these contracts." Lock v. Lynam, 4 Irish Ch. 188 (1854).

Partner cannot carry on independent business, which in any particular is in competition with his firm. A, B, C & D were in partnership as sugar refiners. B was managing partner, and made all the purchases of sugar. He carried on an independent business as a sugar dealer, and was able to buy to great advantage. Accordingly, in 1851, he bought a quantity at a time when he thought it likely to rise, and it having risen, and the firm being in want of some, he sold it to the firm at a profit, but at the fair market price of the day. A complained on the ground that they were refiners, not speculators. B took offence and cancelled the transaction, but continued to speculate, and, unknown to his partners, sold his own sugars occasionally to the firm, but always at the market prices. In this way he made great profits. A filed a bill against him and the other co-partners to compel an account, claiming that the firm was entitled to the profits B had made.—B accountable. Bentley v. Craven, 18 Beavan 75 (1853).

4. *Co-owner of trading ship accountable for profits made by trading on his own account.* B, part owner and master of a ship, made a long voyage, touching at several ports and trading on the joint account of himself and the co-owners. He sold the ship at Sydney, and soon after made large purchases of wool, in part of which C & Co., had an interest. The wool was consigned to D, E & Co. A and others, co-owners of the ship, claimed that the wool was purchased with partnership property, on partnership account, and belonged to the partnership. B insisted that besides acting as master of the ship, and trading on the joint account, he had a right to trade, and did trade on his separate account; and that with the profits of such separate trading he bought the wool in question. A having already obtained an injunction against D, E & Co., asked for an injunction to restrain B from receiving the wool.—Injunction granted. Gardner v. M'Cutcheon, 4 Beavan 534 (1842).

Collateral business secured by a partner through his position in the firm, enures to the firm, if germane to its purpose. A, B and others agreed to carry on the business of a common carrier between London and Falmouth, a separate portion of the road being allotted to each, and it having been stipulated also that no partnership should exist between them. B for himself and the other parties agreed with the Mint to carry coin from London to Falmouth and intervening towns. Afterwards he made another agreement with the Mint to carry other coin to places not on the road. A and the others claimed shares of the profits made out of the second contract—All the parties were entitled to share in the profits. Russell v. Austwick, 1 Sim. Ch. 52 (1826).

5. *Contract secured by partner by means of his position in firm, enures to the firm.* A and others were partners with B, in the coal business, under the name of B & Co. C enabled D, a clerk in the office of B & Co., to get a government contract for coal, with B as his surety. D assigned the contract to an association of coal companies. Between these companies there was a memorandum signed by B in his own name, and signed also by all the companies who were parties. At meetings of the association, each company was represented by one of its members; B attended, but none of his partners. All the other parties treated the transaction as if the firm of B & Co. was one of the members, and, in fact, their understanding was that the original contract had been awarded to the firm. The arrangement was, that the parties should all furnish coal to the association in various proportions, at twenty-five cents above the market price; the association then delivered the coal to the government, and the profit or loss was to be shared by the parties in proportion to the coal furnished. B & Co. sold coal to the association, and B, after settlement with the government, received one-sixth of the profits made by the association. He divided with C, but none of the profits ever came into the hands of the firm. B died, and A *et al.* filed a bill against his executors, for an account and payment, averring that B's share was received by him for the use of the partnership. Master reported in favor of defendants; report confirmed; appeal.—Decree reversed. THOMPSON, C. J.: "In the absence * "* * of special provisions, each partner is in a fiduciary relation "to his co-partners, and must devote all his energies for the promo-"tion of the firm exclusively, and account for all moneys received "by him in and through its legitimate business. These being the "duties and obligations of every member of a partnership, he who "claims exemption from them must show that it exists either in the "terms of the organization, or by the assent of all his co-partners." Bast's Appeal, 20 Smith 301, Pa. (1872).

6. *Partner's breach of articles not to engage in other business gives firm no right to his profit, unless he competes with firm.* A Bros., composed of A, B & C, were salt merchants and brokers for seven years. By articles, C and D covenanted not to engage in any business except on account of A Bros. For the last two years C was dormant partner with his son D, in the manufacture of salt, and at end of seven years became ostensible partner. A and B brought bill for C's profits in salt manufacture.—Dismissed. Breach of covenant's remedy, injunction or dissolution and damages, not profits of business, because not competing with firm business. Dean v. MacDowell, 8 Ch. D. 345 (1877).

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§152.

In dealings with third persons, the authority of each partner is limited by the equal power of his co-partner; in questions of domestic administration, the majority controls.

The fundamental principle of partnership is equality between the partners, and each partner unites in himself all the attributes of the firm. When he is acting alone, strangers are entitled to deal with him on this basis. But the partnership relation implies the unanimity of the partners; therefore, in contracts with third persons, a prohibiting partner may avoid liability by notifying them of his dissent and refusal to be bound.[1] But where the question arises between the partners themselves, and relates to the administration of the firm business, the will of the majority controls. Third persons, whose rights are incidentally involved, must respect the determination of the majority.[2] This doctrine establishes a *modus vivendi*, and prevents a partner from frustrating the purpose of the firm. He is always sufficiently protected by his right to dissolve if dissatisfied with the management. If the matter in dispute involves a material alteration of the constitution of the partnership, unanimity is required.

1. *Partner's collusive sale passes no title. Partner may countermand his co-partner's sale before delivery.* B & C, partners in marble business. D, father of C, while engaged in removing marble was notified by B to desist. D removed the marble, alleging a sale to him by C. A, assignee of B & C, brought trover. By plaintiff's evidence marble taken was worth $1,411. Charge: If sale collusive, void; if not, title passed. Verdict, $3,243.30. A released all above $1,838, to hold his verdict.—Judgment affirmed. Jury found sale collusive. *Dictum*, B's dissent revoked C's agency. Yeager v. Wallace, 7 Smith 565, Pa. (1868).

Partner may revoke co-partner's implied authority to buy by notice to seller. B was dormant partner of C. C bought goods of A on joint account, and proposed to give joint note for price. B declined to be bound by purchase and sign note as a principal debtor, but did sign it as endorser. A sued B & C as makers. Defence by B: He had refused to be bound by the purchase. Instruction to jury: B's refusal to sign note as maker relieved him from liability as co-principal.—Error. New trial. Court should have instructed jury that if B refused to be bound by the purchase, and not merely refused to sign the note as maker, the verdict should be for B. Leavitt v. Peck, 2 Conn. 124 (1819).

Partner may, by notifying seller, escape liability for co-partner's purchase, although goods received by firm. B, C, D & E, partners. D and E managed the business. B notified A not to sell to D and

E without an order from him. A sold without order, and the goods were used by the firm. A sued B, C, D & E for the price. B's defence: Revocation of authority.—Judgment for B. Feigley v. Sponeberger, 5 W. & S. 564, Pa. (1843). The goods should have been returned to exonerate defendant. Johnston v. Bernheim, *supra* § 115, n. 3.

2. *Partner prevented from frustrating business, and bound by majority management.* A, B *et al.* had a ship built, and ran her on joint account. A owned 1-4, and was agent; B was master. A and B disagreed, and a majority displaced A from the position of agent. A asked for an account, a receiver, and an injunction against his associates to prevent them from continuing to run the boat.—Dismissed, except for an account. Defendants allowed to run the boat upon giving security to A. Dunham v. Jarvis, 8 Barb. 88, N. Y. (1850).

Majority controls in partnership organized as joint stock company. In a newspaper firm organized as a joint stock company, with fifty shares of capital stock; the majority held 27, and the minority 23, shares. The majority, at a regular meeting, by resolution, displaced the publisher and elected one of their number, A, in his place. A *et al.* brought bill to enjoin former publisher and minority from interfering with A's management.—Decree. Peacock v. Cummings, 10 Wright 434, Pa. (1864).

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§153.

During the partnership, litigation between the partners is suspended.

A partner can not sue his co-partner on a firm transaction. Nothing but a final balance, after all the assets and liabilities of the firm have been taken into account, would show what the defendant owed, if he owed anything. A settlement of the account must be made between them. No balance in favor of the plaintiff would show that he could recover the amount from his co-partner. A similar amount might stand to the defendant's credit, and the two accounts would balance each other. The assets might be in the plaintiff's hands, and he might be the debtor, in spite of the accounts. The ultimate balance, after every item and asset has been brought into account, is the only basis of a settlement.[1]

Trading as a company would not enable the firm to sue the members for advances in the business. As a partnership, the company cannot sue until the accounts are settled, although it had taken a promissory note for the amount advanced.[2] The prohibition applies to everything which is an item in the account. It applies to freight earned on a voyage by partners in the vessel. The fact of partnership settles the question, and shows that the freight is an item in the firm account.[3] If co-owners, the voyages would be distinct, and each trip would be a different transaction.

1. *Balance struck in firm books showing value of each partner's share, not a settlement of final account upon which assumpsit will lie.* A, B, C & D were partners in trade. During the year 1860, A died. At the end of the year, the surviving partners balanced their books, and having ascertained how much was due to each of the members of the firm, credited the estate of A with the amount that would have been his, if living. In January, 1869, A's administrator brought assumpsit to recover this sum as a debt due by the partnership. The Court directed the jury to find a verdict for the plaintiff, reserving the point whether the plaintiff was entitled to recover. The verdict was accordingly for the plaintiff for $21,725.44.—But judgment was afterwards entered for the defendant on the point reserved *non obstante veredicto*. Judge HARE: "The point (whether the action could be maintained on the "above account and balance) has frequently been before the courts, "and always decided in the negative. For, as the object of such an "accounting is to ascertain what is due or coming to each of the "parties from the assets of the firm, it cannot be interpreted as a "guarantee that the assets will be adequate to pay the debt. * * * "It may be that a partner who stands, on the face of the account, as "a creditor, has the bulk of the property of the firm in his hands, "and would, if it were turned into cash, be largely a debtor." And the Supreme Court affirmed the decision, adding: "Whether an ex-"press promise to pay be essential, or an implication of a promise "will arise from a settlement and balance struck, it is immaterial; "all the authorities coinciding, that to support assumpsit, there "must be a settlement and balance found due to the other partner "who sues for it. * * * Clearly, therefore, the suit should have "been account render, or a bill in equity for an account." Ferguson v. Wright, 11 Smith 258, Pa. (1869).

2. *Member of partnership cannot sue for an advance without an account.* A & B subscribed to a projected joint stock company. The company needing money, the firm of A, B & C lent them £2,000 on their promissory note, which coming due, suit was brought.—A & B, partners in the company, and, therefore, the suit would not lie. Perring v. Hone, 4 Bingham 28 (1826).

3. *Partner cannot sue for his share of profits without an account.* A & B owning one-third of a sloop, brought debt against the co-owners for one-third of the freight earned in sailing the vessel. They obtained verdict and judgment in the lower court.—In the upper court, reversed. The demand, from its nature, brings into controversy an unsettled partnership account, which cannot be determined in this form of action. Young v. Brick, Pennington 663, N. J. (1810).

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§154.

A partner who has paid a firm debt, cannot claim as against his partner to be subrogated to the creditor whom he has paid.

He acquires no right against his co-partner by payment of the firm debt until a final settlement, and the creditor will not be compelled to assign the claim upon a tender of the debt by the creditor of a partner, in order that he may use the claim to collect the debt out of the co-partner. Indirectly, the partner would thus enforce from his co-partner repayment of the debt before a final settlement.[1]

1. *Partner paying judgment against firm cannot have it marked to his use.* A & B, partners, gave C a judgment-note for $600, which he entered up, December 26, 1874. On November 17, 1875, he caused execution to be issued and levied upon the real and personal estate of B alone. D, a creditor of B, tendered C the full amount of his judgment, interest and costs, if he would stay the writ and mark the judgment to his use. C consented on condition that he might be allowed to release A from the payment. D refused this, and B & D petitioned the Court for a rule on C to show cause why he should not accept the money, stay the execution, and mark the judgment to D's use. The lower court granted the petition, and decreed that C should assign to D, without recourse, that D might receive and collect from A the amount to which he would be entitled by subrogation or by way of contribution.—Error. PAXSON, J.: "The radical error of the de-"cree made by the Court below, consists in the fact that it attempts "to work out the equities between A and his partner B in a summary "manner. Where one partner has paid a partnership debt, he is not "entitled to subrogation against his co-partner until an account has "been settled between them. In what other way can it be ascer-"tained which is the creditor, and which the debtor partner? How "can it be ascertained, upon the execution, how much of the debt A

"ought to pay? Clearly, this cannot be done without a settlement "of the partnership accounts." Fessler's Appeal, 3 W. N. C. 71, Pa. (1876).

But subrogation is permitted between different firms with a common member. Laughlin v. Lorenz, *supra* 72, note 2.

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§155.

A partner cannot sue his co-partner during the partnership for mismanagement in transacting the business.

The misconduct cannot be accounted for until the affairs are wound up, although it might accelerate an adjustment by furnishing the ground for a dissolution.[1]

1. *Negligence furnishes no ground of action independent of account.* A, B & C were joint owners of a sloop. B, without A's knowledge, sold or lent the anchor and cable belonging to the sloop, for want of which the sloop went adrift and was lost in the ice. A sued B for his mismanagement.—The state of demand does not raise a sufficient ground to support an action. Patterson v. Burton, Pennington 717, N. J. (1810).

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§156.

A set-off does not avail between partners, except as incidental to the account for a settlement.

The claim must be liquidated to be available as a set-off.[1]

A partner cannot set off the co-partner's quota of a firm debt. The firm debt must be first liquidated, and then the co-partner's share of it ascertained. This requires an account.[2] A partner can not set off his co-partner's unliquidated share of firm liabilities

against the price of the co-partner's share. The balance depends upon a settlement of the account, the sale being made subject to the firm debts.[3] If the price is paid in stock, and not in cash, the debt is deducted from the actual value of the stock, and not from its nominal or par value.[4] If a partner sues a co-partner on his note, he could not set-off an unliquidated balance of account, especially if there was a third partner, because the account would involve him in the settlement, and would not be simply between the plaintiff and defendant.[5]

The partners must be parties to the adjustment. The debtor to a partner and creditor of the co-partner cannot make his settlement depend upon the balance of the partnership account. Equity would not take the account as accessory to the suit between one partner and a stranger to save a payment by the co-partner, if the partner's balance should be in his favor.[6]

1. *Unliquidated balance on partnership account no set-off.* A sued B on a promissory note. B attempted to set-off an unsettled claim arising out of partnership between himself and A.—Disallowed, because partnership accounts must be settled in equity. Love v. Rhyne, 86 No. Car. 572 (1882).

If in action against firm the debt is denied, partner cannot set-off separate claim. A sued B & C, for services which were to have been paid in money and board. Firm denied the debt. B offered to set up a counter claim against A for board.—Disallowed, because having denied original debt, counter claim could not arise out of the transaction. Jenkins v. Barrow, 35 N. W. Rep'r 510, Iowa (1887).

2. *Unsettled partnership account no set-off against claim of co-partner.* A sued B on a separate claim. B attempted to set-off a balance of account in firm, of which B & C were members.—Disallowed, because no account had been taken. Wood v. Brush, 13 Pac. Rep. 627, Cal. (1887).

3. *Partner's advances to pay firm debts not a set-off against a note for the price of co-partner's share, unless partnership account settled.* B bought out C's interest in C & D, subject to the firm debts, and gave him in payment a note for $250. D & E signed it, without consideration, as sureties, on an agreement that D would take C's share, subject to the firm debts, if B did not wish to keep it. D did take it. C died, and A, his widow, sued D & E on the note. D's defence: C died insolvent and indebted to D, $358.40, for half the firm's debts

paid by D. Firm debts still outstanding, which D would have to pay, amounted to $1,000, and extent of firm assets, $200.—Recovered. D could not set-off against the note payments made on firm account, because the balance could be ascertained only by a settlement. Tomlinson v. Nelson, 49 Wis. 679 (1880).

Partner cannot set-off co-partner's quota of a firm debt in a direct action. Must bring account. A sold out his share of the firm property to B, and sued him on his note for the price. B admitted the claim, but set-off two items of charge for services of his sons to the firm, employed by B upon A's promise to procure other employees to do equivalent services. A excepted to B's evidence, because it constituted a variance from the declaration in set-off.—Sustained. The charges are not claims of B against A, but of B against the firm. A can be charged with his quota of the items only in an action of account. A direct suit for a partnership claim does not lie between partners even after dissolution. Dodd v. Tarr, 116 Mass. 287 (1874).

4. *Partner may recover his quota of price for sale by co-partner of whole firm stock.* A contributed land, and B took title for firm. B, without A's consent, assigned firm property to corporation for 6000 shares of its capital stock. A sued for his quota, less number of shares which, at par, equalled his debt to B.—Judgment for A for his share of price, but payment of his debt in stock at par disallowed. Cheeseman v. Sturges, 6 Bosw. 520, N. Y. (1860).

5. *Unliquidated balance of partnership account not a subject of set-off, because a confusion of parties.* B, C & D, partners. B gave his note to C, who endorsed it to E. E assigned the note, after its maturity, to A, in consideration of certain shares of stock, to be transferred when the note was paid. A sued B on the note. Defence: A not a holder for value, because no consideration passed until note was paid. Set-off, unliquidated balance of partnership account against C.—Recovered. Consideration sufficient. Set-off disallowed, because counter claim unliquidated, and not between B & C alone. B's only expedient would be a cross-action, with D as a party, by which a settlement of the partnership accounts could be effected. The equitable character of the set-off would be no objection. Cummings v. Morris, 25 N. Y. 625 (1862).

6. *No balance of a partnership account is available as a set-off, even by the partners' consent, unless they are parties to the proceedings for a settlement.* B & C, partners in 2,700 sheep. B sold 1200 to D, for $3,000. D paid $1,500, and resold 600 sheep to C, for $1,575, and it was agreed by the three that the debtor should be ascertained by the partnership account. C owed D and D owed B. If B, in the partnership settlement, owes C, C need not pay D, but can set-off B's debt against D's claim. B assigned A, who had knowledge of the arrangement, and he sued D for $1,500, the balance due. By agreement of counsel, a reference was made to ascertain the state of the partnership account, in order to carry out the arrangement. The referee found that C was indebted to B, and accordingly, that A might recover.—Reversed. No adjustment of partnership accounts will be instituted in any collateral proceedings, unless the members of the firm are made parties to the settlement. Young v. Hoglan, 52 Cal. 467 (1877).

§157.

An exception is made to the prohibition of suits between partners when they have stated an account.

This is equivalent to a settlement, and makes a final balance by agreement of the parties. Such an agreement will sustain an action of debt,[1] or assumpsit;[2] though not an action on the case,[3] because it involves a tort.

If a settlement was made, assumpsit would lie without an express promise to pay the balance. It would be implied in consequence of the settlement.[4]

1. *Partner may sue co-partner in debt after settlement and division of assets for balance still due by reason of mistake in addition.* A owned a peach orchard, and agreed to market the crops with B, each taking one-half the profits and paying one-half the expenses. They realized $2,000, and divided the profits. A sued for $56, on the ground of a mistake in addition of the items of accounts. B pleaded the settlement in bar.—Judgment for A, as a partner may sue his copartner on an account stated. Jaques v. Hulit, 1 Harr. 38, N. J. (1837).

2. *Assumpsit lies on balance struck and express promise to pay.* A brought assumpsit against B & C on certain accounts, one of which was a balance due him on a statement and settlement of certain stage accounts, in which transaction they and others had been partners. The payment of this balance had been assumed by B & C. The defendants pleaded the partnership, under which they claimed the action was not maintainable.—Action sustained. "If there has been "a dissolution of the partnership, a settlement, a balance struck, "and an express promise to pay, an action may be maintained." Gulick v. Gulick, 2 Green 578, N. J. (1835).

3. *Partner cannot sue in case for his share of profits.* A sued his partner in trespass on the case for one-half profits of business.—If any action could have been maintained for the cause set forth, it should have been an action of debt, and not trespass on the case. Dunham v. Rappleyea, 1 Harrison 75, N. J. (1837).

4. *Action lies for balance due on settlement without express promise.* B & C, partners. A, who was B's separate creditor, attached funds of B in the hands of C. There was evidence that after the attachment C had stated that he had $620 of B, as balance of partnership account. Defence by garnishee: Partnership and no account stated. —Judgment for A. Evidence of admission justified jury in inferring a settlement. The law implied a promise. Knerr v. Hoffman, 15 Smith 126, Pa. (1870).

§158.

Another exception is made, which proves the rule, because it is within the principle of the prohibition: Any transaction which is independent of the firm accounts, may be the subject of a suit by a partner against his co-partner.

The exception covers a partner's liability for his contribution. The liability is antecedent to his membership, and may be enforced by his co-partners in an action at law.[1] Any transaction between partners which is not part of the partnership business, is foreign to the account, and may be the subject of a suit at law.[2] An account is also unnecessary where the partnership consists of a single transaction,[3] or where the firm business has been settled, the debts paid, the property distributed or exhausted, and the action is for contribution upon a limited number of transactions.[4]

1. *Action lies at law by partner against co-partner for his contribution.* A & B bought an interest in a sloop in common. A, who paid the price, and also the license fee, sued B for his half. Defence: A partnership, and no action at law.—Action lay. No partnership account involved in suit Reeves v. Goff, Pen. 609, N. J. (1809).

   Joint stock company a partnership. Trustees of unincorporated society sued stockholder on his contract of subscription. He set up partnership, and that trustees should bring account.—Stockholders declared partners, but suit maintained, because contract of subscription antecdent to partnership. Townsend v. Goewey, 19 Wend. 424, N. Y. (1838).

2. Coles v. Coles, *supra* § 13, n. 2.

   Partner may recover loans from firm in which his co-partner is a member. B borrowed money of A, his partner, for B, C & D, and gave firm notes for loans. A sued B, C & D. B served, but C & D not found.—Judgment for A, $16,038.36. Subsequently *sci. fa.* served on C & D, and court excluded B's admission that loans were made by A for C & D, under charge that A couldn't recover because B a member of both firms. Judgment for C & D.—Reversed. Notes make a contract between A and B, C & D, and entitle him to sue without reference to A & B. Contract could not be varied by parol. Moore v. Gano, 12 Ohio 300 (1843).

3. *Partner may sue at law for his share of the profits in a single transaction without a previous accounting.* A sued his co-partner B, alleging partnership in a single transaction, its close and B's appropria-

tion of the profits. Defence: Account necessary.—Judgment for A. Pettingill v. Jones, 28 Kan. 749 (1882).

Partner in single transaction who has advanced sum as capital may sue his co-partner at law for balance due. A & B partners in a single venture. A advanced price, and then sold contrary to B's instructions, and compromised debt. A sued B for his proportion of loss, but he repudiated transaction.—Liable, as partner: A entitled to exercise his own discretion in selling. Cunningham v. Littlefied, 1 Edw. Ch. 104, N. Y. (1831).

4. *Partner may sue co-partner for contribution upon advance without a settlement.* A paid joint note and sued his partner B for contribution. No outstanding claims by or against firm, and no assets left. Defence: Note for firm business, A kept accounts and no settlement. —Judgment for A. Claim, contribution to over-advance recoverable without account, if upon a limited number of transactions. Clarke v. Mills, 13 P. Rep'r 569, Kan. (1887).

Massachusetts and Pennsylvania rule against general authorities.

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§159.

The account stands upon the same footing as other litigation.

As a general rule, account does not lie during the continuance of the partnership, because a complete account implies a termination and settlement of all firm transactions. But the distinction which is applied to other litigation between partners, also applies to an account. An account may be had of all transactions which may be isolated from the general business of the firm, and the settlement of which does not necessarily involve a dissolution of the firm.[1] This segregation may arise from the nature of the transaction, or may have been brought about by the contract of the parties.

1. COLLYER on Partnership, § 30, and notes.

Article by TRACY GOULD, Esq., 21 Albany Law Journal 168 (1880).

§160.

The form of procedure raises a barrier against a partner suing his firm, or *vice versa*.

The firm could not recover in a suit at law upon a claim against a member, because there is no person who can institute proceedings and act in the litigation as a party plaintiff. The partners are the only plaintiffs who can sue for the firm, and they must all join in the action. The absurdity would then be presented of a person being both plaintiff and defendant in one and the same suit. He would, in his capacity of plaintiff, ask judgment against himself in the capacity of defendant.[1]

The law tolerates no such incoherence. The consequences which follow from the partnership being an aggregate of the partners, are carried out with consistency. As no debt could be collected by the firm from a member, or *vice versa*, no attempt to enforce collection is made. The claims of the firm against its members, or their claims against the firm, are not computed among the assets of either the joint or of the separate estate. Being uncollectible, the debts have no legal or equitable existence.

1. *Partner cannot sue co-partner on a firm obligation.* A's name was entered, as a subscriber, on B, a company's books, and scrip was issued to him, which he sold before the company's deed was executed. A never signed the deed. He sued C, a member, on a note given by the projectors, which was altered, without authority, from joint into joint and several.—No recovery, as A was a partner, and also liable on the note. Perring v. Hone, 4 Bing. 20 (1826).

§161.

An Act of Assembly in Pennsylvania removed the obstacle of procedure, and allowed partners to be both plaintiffs and defendants in the same action.[1]

The Act does not enable a partner to sue his firm. An independent plaintiff is required, who is not also liable on the contract which he seeks to enforce. The evil is more extensive than the remedy provided. The limited scope and technical character of the statute make the form of procedure control the right.

A party who was a co-promissor in a joint contract, and at the same time was the promissee, could not sue his co-contractors on the promise at law, because they could plead in abatement his non-joinder as co-defendant.[2] This evil can be cured by nothing less than a procedure which will enable the plaintiff to recover his claim in spite of his being, in form, one of the contractors who agree to pay it. This should be the case wherever the claim does not, from its nature, involve an account, and where it is possible to ascertain, by simple division, the sum due to the plaintiff from his associates. If there was a joint promise of all, including the plaintiff, as promissor, to the plaintiff, as promissee, he may recover from his associates the amount promised, less his quota. It depends upon the nature of the claim whether the plaintiff can have a judgment against his associates *in solido*, or a judgment against each for his rateable portion.[3] No mere difficulty of procedure should deprive the plaintiff of his action at law. This view has received the sanction of the English courts, and there

the action at law is permitted when the contract may be interpreted as a claim by the beneficiary against the co-contractors, excluding himself as a debtor-contractor.[4] This construction gives effect to the contract.[5] If the plaintiff was meant to contribute to the payment out of a fund, as, for example, out of profits, his quota would be deducted from the claim. The co-contractors might not be liable unless a fund arose, or they might be liable in any event. The plaintiff's claim might be limited according to his share, or a guarantee might be intended.

In a suit at law under the statute between two firms with a common member execution is confined to the joint estate.[6] Wherever the procedure allows suits at law between firms with a common member, the execution is necessarily confined to the firm assets. This is the result of the statute in Pennsylvania, and of the practice in New York.[7]

1. The Pennsylvania statute provides: "That no action * brought "by partners * against partners * shall abate, or the right of such "partners * plaintiffs to sustain their action be defeated by reason "of one or more individuals being, or having been members of both "firms, or being or having been parties plaintiffs, and also of parties "defendants in the same suit, * but the same shall proceed to trial "and judgment as though the parties plaintiffs and defendants were "separate and distinct persons." 14 April, 1838, P. L. 457.

2. *Party joining in promise cannot sue his co-promissors.* A, B, C, and others covenant with A that he shall go to Mexico, and explore and work some mines there for three years for $5,000 a year. A brings an action of covenant against B, C and the rest for his salary. The defendants plead non-joinder of A, to which A demurs.—A had no action at law. He had none under the law prior to the Act of 1838, and it is well settled that that statute only applies to contracts where one or more of the parties plaintiffs are not bound by the agreement which they seek to enforce. A can only obtain redress in equity. Price v. Spencer, 7 Phila. 179 (1870). In Equity, 40 L. I. 76, Pa. (1873).

3. Raiguel's Appeal, *infra* § 162, n. 1, *a*.

4. *Parties contracting for performance to one of them may be sued by him.* A signed an agreement with B, and others, for exhibition of his dwarf at their expense, though A furnished stage-dresses. They had 3-4 and he 1-4 clear profits. A was also employed by B, *et al.* A

brought trover for his stage-dresses. Plea: Non-joinder of A as co-defendant.—Recovered. A was a separate contractor, and did not agree to pay himself. Bryant v. Wardell, 2 Exch. 479 (1848).

5. *One of several may sue his associates on the promise of all to him.* A, B, C, D, E & F agreed, in writing, that A should go to California and select a mine, to be bought on joint account. They each subscribed $100 to pay his expenses to California, and his compensation was left open. A made the trip and selected the mine, but his associates abandoned the speculation. A brought bill against his associates for compensation and expenses. Defence: Subscription limit of liability.—Decree. Plaintiff may recover five-sixths of sum which will repay expenses and be a fair compensation. Duff v. Maguire, 107 Mass. 87 (1871).

6. *If the same person is joined with plaintiff and defendant, the execution is limited to the joint assets.* A was a member of both the firms A, B & C and A & D. The firm A, B & C obtained judgment against the firm of A & D, and after some preliminaries, not pertinent to the statement of the case, issued a *fi. fa.* The sheriff returned *nulla bona* as to the joint property of A & D, and a levy on the personal property of D. D moved to set aside the levy, because A was both plaintiff and defendant, and the judgment, if valid at all, was only so against the partnership effects of A & D. The lower Court set aside the levy.—Judgment affirmed. GIBSON, C. J.: "The action authorized by the "Statute (1838) may readily be conducted to judgment; but how "could it be thought that a writ of execution might be applied to "the persons or the separate estate of the individuals who compose "the debtor firm, without doing injustice to some of them, or pro-"ducing some whimsical absurdity, it would require all the ingenuity "of the person who framed the act to explain. It was enacted be-"fore the abolition of imprisonment for debt: and to have allowed "the judgment authorized by it the full common law effect, would "have subjected one of the defendants to arrest on his own execution, "but still with the means of regaining his liberty by ordering, in his "capacity of plaintiff, his body to be set at large in its capacity of de-"fendant; an operation which would have discharged the debt. The "same absurdity would appear in the seizure of the separate estate if a "party plaintiff in satisfaction of his own execution. It might be "avoided, indeed, by directing the sheriff to seize the property of the "other defendant which, though it would be less absurd, would be "more unjust. * Say that only a moiety of the debt shall be thus "levied, and you mitigate the injury, but do not prevent it; for the "ultimate justice of the case would depend not on the apparent duty "of equal contribution in the first instance, but on the balance of the "partnership accounts, which a court of law is incompetent to ascer-"tain. * What effect, then, must we give to such a judgment? "Its office is obviously to settle the general question of indebtedness "between firm and firm, and it was, doubtless, intended to be fol-"lowed by execution; but when we subject the joint effects to seizure, "we do, perhaps, all that was contemplated. That the action was "considered as a proceeding between firms as independent bodies, "having an existence distinct from the individuals who compose "them, seems clear; for the solecism of an action brought by a man "against himself for the purpose of self-execution, could scarcely have "been entertained by the Legislature. The levy was therefore prop-"erly set aside, and D's separate property cannot be seized until the "accounts are taken and the equities settled between the defend-"ants." Tassey v. Church, 6 W. & S. 465, Pa. (1843).

7. *Firms with a common member may sue each other as if corporations.* A, B & C, were indebted to C, D & E, on account stated. A & B sued C, D & E for the amount, averring that C was not joined as plaintiff, because he refused his consent. Defence: Account necessary to determine each partner's position.—Recovered. "Let the "debtor firm pay its debt, and the creditor firm after receiving their "debt adjust their individual equities among themselves. Equity "treats a co-partnership firm for purposes of trial as an artificial "body, a *quasi* corporation." Cole v. Reynolds, 18 N. Y. 74 (1858).

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§ 162.

But such firms are not limited for redress to an action under the statute; they may still resort to equity.[1]

The difficulty, however, does not arise from procedure, and is not obviated by a resort to a remedy in equity. The obstacle is equally formidable in equity.[2] The common member of two firms must be put by the decree in one firm or the other.

If he is held a plaintiff, he may be the debtor in the defendant firm, and a decree might enable him to compel his co-partners, who are already his creditors in the defendant firm, to pay an additional debt for him. He might collect the debt out of their separate estate, or he might turn around and pay it himself by setting off his debt, release his co-partners defendants, compound the debt, or delay its collection, at his discretion, and the only redress of his plaintiff co-partners would be an account.

If he is made a defendant, he is excluded from the plaintiff firm by his co-partners, although he is entitled to a share of its property and to a joint control in the business. He is compelled to pay his co-partners in the plaintiff firm, not their quota of the claim,

but the whole amount, which is more than they could receive if it was his individual debt. They might collect all from him; they might seize and sell his separate estate to pay the debt. He might be a creditor of his co-partners, and yet they would collect more out of him instead of setting off what they owed him in payment of the claim.

1. If a decree against his co-partners for a misappropriation of the assets to their separate debts would settle and close up the firm transactions, the court will dispose of the case, although the mutual rights of the wrong-doing partners in respect of the contribution to the payment of this decree, are left unadjusted for a subsequent bill.[a]

a. *Suit in equity between firm with a common member not superceded by statutory remedy.* Firm of B & C dissolved, and new firm of A, B & C formed. Without A's consent the assets of the new firm were applied by B & C to the payment of the debts of the old firm of B & C. A brought a bill against B & C for his share of the sum misappropriated. The transactions of both firms had been closed, and the account settled. This suit involved the only unsettled item.—Decree: "Prior to Act, 14 April, 1838, the firm of A, B & C could not have "maintained an action against the firm of B & C. The appropriate "remedy of A would have been a bill to account. * * * Until either "B or C pay this debt, for which they are jointly and severally liable, "what they respectively owe each other, cannot be ascertained and "settled. The Act of 1838, which gave the remedy at law, could not "take away the previously existing remedy in equity." Wentworth v. Raiguel, 9 Phila. 275 (1873); s. c. Raiguel's Appeal, 30 Smith 234, Pa. (1876).

2. Article entitled: "Suits Between Firms with a Common Member." 5 Am. Law Rev. 47 (1870).

Partner in two firms makes dissolution condition of an account. A & B brought bill against A & C to enforce of a bill of exchange made to plaintiff by defendants.—Dismissed. Account between firms would not disclose A's standing with both B and C. If A, the debtor in defendant firm, he shouldn't collect what he owes from C by means of association with B; nor if debtor in plaintiff firm should he receive what belongs to B. Equity does nothing by halves, and account involves dissolution. Rogers v. Rogers, 5 Iredell's Eq. 31, No. Car. (1847).

§163.

The equities of each individual plaintiff or defendant must be ascertained and worked out, although this involves a dissolution of both firms.

The first thing to find out is what each partner is entitled to. Other equities than an account between the firms are involved. The creditor-firm might be indebted to the common member. He should not then pay over an additional sum, and increase the firm's debt to him, but set off his claim. The debtors may not owe the debt in equal amounts, or the creditors be entitled to equal parts of it. A settlement of the accounts between the partners of each firm must be made; but a general account cannot be taken without dissolving the firm. The balance of account shifts until the ultimate balance, upon a disposition of all the assets, is ascertained. If the firm be regarded as a person, the remedy would avail, as the common member would be identified with either firm, and his equities would enure to it, and his liabilities could not be severed from it and enforced apart by an execution against his separate estate. If any settlement short of a dissolution is made, all the courts can do is to omit an adjustment between the partners and let the plaintiff firm proceed against the defendant's firm assets alone.[1]

If a succeeding firm pays, at request, the debts of a prior firm, and then sues for reimbursement, it would be subrogated to the rights of the creditors whom it had paid. But suppose there was a common member of both firms and no subrogation. The plaintiff would be restricted to the firm assets, so far as the common member was concerned. Would he be entitled to go against the separate estate of the other partner? A & B are succeeded by B & C upon A's death. A was indebted to A & B, $12,000. B was indebted to A & B, $36,000. B & C sued A &

B for money lent. If the plaintiffs sought to treat A's debt of $12,000 as an asset of his firm, could they enforce its collection until B had paid his debt of $36,000? Could not A's representatives set off this debt against $12,000 of B's debt, and claim that A owed his firm nothing? This is the Scotch plan, which has been unconsciously applied in Pennsylvania.[2] If the common membership of B in both firms would prevent any recovery against his separate estate, the answer is, that what he owes his firm is joint, or partnership assets, and not his separate estate. It is not the balance after deducting what A owes the firm ($12,000), or $24,000, but both debts of the partners, or $48,000, which are the firm asset. If B's debt could not be collected, then A's debt, which involves the same adjustment of accounts, could not be collected by the firm to repay its debt. Although McCormick's Appeal makes the debt of each partner to his firm partnership assets, yet that notion conflicts with the refusal of the courts to settle the partners' accounts in suits between firms with a common member. The Scotch plan is inconsistent with the principle which prohibits any collection of claims between the joint and separate estates upon insolvency, and which is based upon the impossibility of settling the partner's accounts without a dissolution of the firm. All the courts could do was to omit adjustment between the partners, and let the plaintiff proceed against the firm assets alone. By Judge AGNEW'S theory, the firm assets are made to depend upon the partner's accounts, and then the plaintiff cannot, logically, touch even firm assets.

1. *No suit between firms with common member.* A & B, partners as ship carpenters, repaired a ship owned by B & C. B failed and assigned his share to C, releasing all interest in this claim to A, who sued B & C. C's defence: When B relinquished to C one-half interest in ship, he agreed to repair ship. His knowledge of this duty constructive notice to his partner A, and negatived a promise by C to pay.—Judgment for C. Notwithstanding assignment, C may treat this as a partnership claim of A & B, admit liability of B & C as co-owners to A & B; then A might make C party to action for account against B, and make C liable for any balance due on the account to the extent of the cost of the repairs. But this is simply an action of debt by one firm against another, and yet necessarily raises equities between the parties. If inequitable that B should collect this money from C, A cannot claim through B. A's objection that C could not set-off claim for want of mutuality met by A's incapacity to sue on firm claim on account of common member. In equity A must show that this money is due B on settlement of account between B & C. A might show that B improperly withdrew money from A & B, and Equity would marshal assets, but no such case proved. Englis v. Furnis, 4 E. D. Smith 587, N. Y. (1855).

2. *Partner's debt to his firm is a firm asset on insolvency.* A & B were partners. B died, and soon after A made an assignment of all the firm property for the benefit of its creditors. The assignee claimed against B's administrators for $16,790.13, the amount he owed the firm. A was also indebted to the firm to the amount of $11,204.68. Both A and B, as well as the firm, were insolvent.—The debt of the partner to the firm is a firm asset for which he must account to his co-partner, who would first deduct his own debt to the firm, and claim one-half, $2,792.72½, the balance of $5,585.15 as due on account of his share of the firm assets. McCormick's Appeal, 5 Smith 252, Pa. (1866).

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§164.

The effect of allowing a single person to trade as a partner in different firms is to acknowledge different capacities in a single individual.

But the tenet of the Common law was the indivisibility, not the divisibility, of a person. A capacity was recognized only when it was embodied in a person.

In the main business of partnership the Common law adhered to this position, which could not be assaulted in front, and had to be turned by a flank

movement. It has been shown that the firm estate served, under the tradition of the Common law, as an equivalent for the separate capacities of partners (§5, 103). So, in this minor point of partnership, as the law is now developing, the common member is acquiring distinct capacities by means of the different business enterprises in which he is engaged.[1] This applies only to cases in which the two firms are not composed of entirely the same members.

Partnership, from its origin, has been considered a relation of persons, and comprehends the total capacity of each partner. No restriction can be imposed upon his power, for he enters into the partnership as a man, and, as such, he is an individual who cannot be severed into parts. As he cannot divide himself into sections, he is unable to trade in different capacities, and must enter into partnership as a unit, or not at all. The delegation of authority is absolute, and cannot be restricted by any contract between the partners. Hence there cannot be two partnerships composed of the same partners. The fact that each business is distinct, that it is carried on in a locality apart, and has no dealing with the other, does not make any difference.[2] Three partners might conduct a hotel in Philadelphia, and might also be cotton factors in New Orleans; each partner could exert the powers of all, and bind the firm, in spite of any allotment of the partners to either business. The distribution of functions would be a domestic arrangement which could not affect strangers. The two trades could not be kept apart without dividing the capacity of each partner, and apportioning the fragments to each business. As the capacity, like its possessor, is indivisible, the

different trades are consolidated into an aggregate business, and any partner may disregard the subdivisions, which cannot tramel his powers, for they are co-extensive with the undertaking.

Thus a banker's general lien, if the firm, composed of the same members, embraces distinct houses alike in name, extends to the securities pledged with each house; though if the firms vary in name, the implication of separate control must be rebutted by a convention expressed, or if tacit based upon full knowledge of the relation, in order to create an ulterior general lien.[3]

A partnership within a partnership, or collateral to it, has less pretension to independence, or to recognition.[4] Should some of the partners in the coal business construct and run a railroad, would each business be kept apart, or would both be consolidated into a single business? Let the original firm consist of three partners, then let the firm join in the new business as one party, with one of the members as the other party. How are the parts to be distributed in the new business? Would the terms of the original partnership be extended to the new enterprise, and regulate both as departments of a common undertaking? The shares might, by the original plan, be equal, but the new arrangement would give the individual member a share of one-half as a party, and also one-third of the other half, as a partner in the firm, which entered as a single party into the new business. Nothing would prevent both plans of distribution from taking effect between the partners, but this domestic arrangement would not prevent a consolidation of the firm.

Each partner would have power to bind his co-partners in either branch of the business.

It has been asserted that the creditor's equity at the Civil law was a *jus separationis*. They might insist that the stock of each business should be kept together as a whole, *universitas rerum*, and that the debts should be paid out of the assets.[5] But the instances in the Digest of a contest between different classes of creditors, related to slaves and sons under paternal power who were allowed to do business on their own account. If either carried on distinct trades, the creditors of each business could insist upon a severance, and demand satisfaction out of the stock to which they gave credit.[6] No credit could be given to the person, and therefore, the creditors' only reliance was upon the fund. The stock was applied as an aggregate to the total indebtedness.[7]

The reason is obvious, if ULPIAN had not stated it. The price of the stock is unpaid. Until an equivalent for it has been rendered, no stranger, though he is also a creditor of the debtor, has any equity to appropriate the stock. His claim is legal and against the person of his debtor, but not equitable and against the fund. The liability of the debtor to him exists, but the merchandise which he endeavors to seize was not the product of his credit, but of the credit given by another. The equity goes to the substance of the transaction, the liability stays in the form.

1. *Equity admits a suit between firms with a common member without a general accounting*. B & C were indebted to A & B. A, surviving and liquidating partner of A & B, offered to prove in bankruptcy against B & C.—Allowed. By reason of A's independent right. The firms are treated as distinct persons. In re Buckham, 10 Nat. Bank Rep'r 205 (1874).

Discharge in bankruptcy for firm and separate liabilities does not release common member from debts of another firm. B was a part-

ner in two firms, B & C and B & D. The firm of B & D filed a petition in bankruptcy to be relieved from their debts, firm and individual, and were discharged. A then brought an action against B & C on a bill accepted by them. B pleaded his discharge. Judgment for B.—Reversed. B's discharge did not release him from liability as a member of firm of B & C. Perkins v. Fisher, 80 Ky. 11 (1882).

2. *Same partners doing business at different places under different names, remain one firm.* Two brothers, B & C, traded in London, as their father's Sons, and in Oporto, Portugal, as Brothers. Bills drawn by the Brothers, and accepted by the Sons, were proved against the Portugal firm by the holder. Claim: The contracts were distinct, as each firm could be held upon its own.—There were no two firms, but only one firm doing business, under two names, at different places. Ex. parte Banco de Portugal, 11 Ch. D. 317 (1879); Banco de Portugal v. Waddell, 5 App'l Cas. 161 (1880).

3. *Banker's general lien covers collaterals pledged with the firm trading under a different name in another locality.* B pledged collaterals with C, D & E, bankers, in Philadelphia, trading as C & D, for a loan. B also pledged other collaterals for another loan with them in New York, where they traded as C, D & E. The proceeds of the collaterals with C & D in Philadelphia exceeded the debt by $55,000; proceeds of collaterals with C, D & E, in New York, fell short of debt, $57,000. C & D, with B's knowledge and assent, mingled the securities, and afterwards sold them all for the aggregate debt. A, assignee in bankruptcy of B, brought bill against C & D, *inter alia*, to recover surplus value of the securities in Philadelphia over the amount of the Philadelphia loan.—Claim disallowed. Sparhawk v. Drexel, 1 W. N. 560, Pa. (1875).

4. *Part cannot prove in bankruptcy against the whole.* B, C & D, partners in Toronto, trading as B & C, sold goods to A, B, C, D & E, trading as E & Co., at Syracuse, and drew on E for the price. E accepted, and an understanding was proved that E & Co. should pay the acceptance. A discounted the paper for B & C, and took an assignment of their claim against E & Co. A offered to prove for the acceptance against the estate of E & Co. in bankruptcy.—Disallowed. Could not prove on the acceptance, because not in firm name. Could not prove on the assignment of B & C's claim, because all the members were partners with E in E & Co. In re Savage, 16 Nat. Bank Rep'r 368 (1878).

5. Dig. 14, 4, 5, 16.

6. The *actio tributoria* furnished the means to enforce the severance. Cours de Droit Romain, par Charles MAYNZ, Professeur de droit à l'Université de Liège, 4ème edition, 1877, § 223, No. 5.
14 Glück 276-8.

7. HÜRLEMANN, *supra* § 101, n. 3.

§165.

A partner, in his double position of proprietor and creditor of the firm fund, has a priority over his co-partners for his advances.

Each partner has a lien on the firm assets for any advance he has made to the firm, or for any outlay on its behalf.[1] From his position he cannot, strictly speaking, be a creditor of his co-partners; his advances and outlays cannot be recovered until the account between them has been stated, and if the assets of the firm are absorbed by the debts, he has only a right against his co-partners for contribution, and not for reimbursement of the entire amount advanced. Inasmuch as he has no claim against his co-partners for repayment in full of his advances, or outlay, at all events, the portion which represents his share is put at the risk of the business, and in consequence he may stipulate against his co-partners and the firm fund for any rate of interest, without incurring the penalties of usury.[2] Upon distribution, he is entitled to priority for the full amount of the advance or outlay before anything can be awarded to the partners on account of their shares in the firm property.[3] In relation to the firm fund, therefore, his claim is as much a debt of the firm, although deferred, as is the claim of a third person; his lien stands upon the same footing as the lien of an ordinary firm creditor.[4] In addition, however, to the rights of a creditor, he may exercise, in his own behalf, his right as a partner, to apply the firm assets to the payment of his firm debt.

1. *Partner has lien on firm assets for advances to firm, but none for advances to co-partner.* A held title for himself, B, C & D, of a quarry, which was sold out under a mortgage. Sheriff held surplus of $4,000 for distribution. A sought, by bill, reimbursement of his advances to firm, and also for advances to B, used in the firm. Defendants, attaching creditor of B and his assignee.—A recovered his advances to firm, but had no equitable lien on B's interest. Hill v. Beach, 1 Beas. 31, N. J. (1858).

2. *Partner's promise to pay for withdrawals interest in excess of legal rate not usurious.* A, B & C, partners, contributed $10,000 each to banking capital, stipulating for 6½ per cent. interest, and agreeing

to pay 10 per cent. on average overdrafts if allowed during partnership. C overdrew for $50,000, and before his death the notes and renewals were charged up. He gave A as trustee for firm, his bond and mortgage for amount with 10 per cent. interest. A foreclosed. Defence: Usury.—Decree. Not a loan, payable absolutely; but profits contingent upon risk of business discounted. The advance by or to partner not a loan or debt. Settlement subject to state of firm accounts. If profits exceed rate of 10 per cent. partner pays nothing, if less, he pays 10 per cent. He chances the risk. A's withdrawal deprives partners of fund which makes profits. He guarantees stipulated amount and insures them a certain amount of gain against a loss of capital. The notes and renewals were forms of banking business, but did not affect character of advance; mortgage security for amount. Payne v. Freer, 91 N. Y. 43 (1883).

3. *Interest on overdrafts by partner not allowed until dissolution.* A & B manufactured steel from 1854 to 1874, and owned mills, machinery and real estate. On A's death, his executrix brought account. Master allowed interest on over advances to B, $72,400, after dissolution, but no interest until dissolution.—Affirmed. Overdrafts, perhaps, not made with A's knowledge, as account unsettled. After dissolution, B should have settled accounts, and is charged with interest. Buckingham v. Ludlam, 2 Stew. 345 E. A., N. J. (1878).

4. *Advance by partner to firm carries interest without express agreement.* A, a railroad contractor, constructed a road in partnership with B, an engineer. They had no capital, and relied on loans for temporary means. They were paid in bonds, stock and cash. A advanced $90,000 for firm, with B's knowledge, and the master allowed interest on the advance. B objected to allowance, and charged A with loss caused by negotiating bonds for firm.—Interest allowed without agreement for advance by partner, and no charge for exertion of discretion in selling firm assets. Morris v. Allen, 1 McCart. Ch. 44, N. J. (1861).

Partner entitled to interest on advance to firm, and may mingle firm funds with his own if no loss results. A contributed $1,000, and B the rest of the capital, to build a State prison. B also advanced $27,064 for firm use, and deposited the funds, with his own, in bank. A brought account. B claimed interest on his advance —Allowed. Mingling firm and individual funds presumably with A's knowledge, and caused no loss. Barker v. Mayo, 129 Mass. 517 (1880).

Uhler v. Semple, *supra* § 112, n. 6.

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§166.

The conversion by a partner of firm property to his own use is a fraud upon his co-partners, and entitles them to recover from his separate estate the amount abstracted.[1]

As the embezzlement is equivalent to stealing, a bill in equity would lie, to compel restitution.[2] The

separate estate need not be increased by the tort. The funds might have been lost in stock speculations. The partner would have been relieved by the extinguishment of his debts, and have received a benefit from the diversion of firm assets. But though he had given, or thrown, them away, the right of dominion, which he exerted, was sufficient to charge him with the tort. The stealing was the wrong, without reference to the purpose for which the act was committed, or the subsequent disposition of the property stolen. The increase of an estate by means of a tort, is a reason to charge a stranger who shares the estate.[3] No reason is necessary to charge the tort-feasor himself. The act which he committed establishes his guilt, and any collateral argument is surplusage.[4]

1. The employment of firm funds in transactions which do not form part of the business, amounts to a conversion.[a]

a. *Partner's employment of firm capital in a new partnership which he forms for his firm with a third person, charges the partner for a conversion of the fund to his own use.* A contributed $6,000 and B $4,000, to buy and sell cotton. B went to Memphis, but not finding any, formed a partnership on account of A & B, though without A's knowledge, with C, a cotton buyer, and gave him $10,000 to buy in Arkansas. C sent back word that he had been robbed by the Confederates. B returned, and paid A $1,000, and he sued B for $5,000. Verdict for A.—Judgment affirmed. B's entering into partnership with C, and giving him the firm capital, amounted to a conversion of it to his own use. Reis v. Hellman, 25 Ohio St. 180 (1874).

2. An injunction will lie to prevent the partner's fraudulent removal of firm stock.[a]

a. *Fraudulent removal of stock by co-partner ground for injunction, not for arrest.* A asked for order of arrest against his co-partner, B, upon affidavits showing fraudulent removal of goods.—Refused. Remedy, injunction and receiver. Cary v. Williams, 1 Duer 667, N. Y. (1853).

3. A stranger who coöperates with a partner in effecting the conversion, is jointly liable for the wrong.[a]

No one can dispute the firm's right but a purchaser for value. A volunteer must account for the property, and for its proceeds.[b]

a. Wade v. Rusher, *supra* § 140, n. 3.

b. *Firm funds used by partner followed into his investments.* A, B, C & D engaged in leather business. D kept books, and was firm financier. On his death, co-partners discovered that he had appropriated $103,000 firm assets. He bought lands, and put title in his wife. He insured his life for $40,000, and assigned the policy to her. A, B & C charged widow, as trustee.—She claimed insurance, and re-tendered premiums.—Trustee *ex maleficio.* Assignee paid no consideration, and stood in D's shoes. Shaler v. Trowbridge, 1 Stew. 595, N. J. (1877).

4. In a banking firm, the city and managing partner took firm assets, and lost them in stock speculations. The firm creditor sought to recover, in equity, from his separate estate, for this diversion of partnership funds. The abstractions were concealed, and not entered in the firm books.[a]

a. *Partner's abstraction and use of firm funds, without authority, in stock speculation charged against his separate estate. Clerk's knowledge not notice to co-partner.* B, banker, took, in 1860, A into business. A contributed no capital, had no experience, and took no part in the management. B abstracted firm funds, to pay losses in stock-speculation, and concealed his thefts by fictitious entries in the books. In 1870, B committed suicide. A being bankrupt, his trustee proved on behalf of A & B's joint estate, against B's separate estate. Defence: Separate estate not increased by B's thefts, and clerk's knowledge of entries notice to A.—Allowed. Separate estate exonerated from liability by fraudulent payments out of joint assets, and clerks not likely to communicate to A items directed by managing partner. Lacey v. Hill, 4 Ch. D. 237 (1876); s. c. 3 App. Cas. 94 (1877).

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§ 167.

A partner who appropriates firm assets for his individual account, commits an act which is *ultra vires*.

The act in excess of his authority created, it was thought, a right in his co-partner to recover a moiety by a separate action. The injury was outside of the partnership, and against his co-partner, as an individual. The act effected, *pro tanto*, a dissolution, and the co-partner, as a tenant in common, had an individual right of action.[1] The tort, however, is against

the firm, and is not a separate injury against the co-partner.

The theory of a tenancy in common, or of several titles in the partners, at first mystified the remedy. The partners were required to join their titles in order to maintain an action. A barrier presented itself in the partner who committed the wrongful act. He could not take advantage of his own wrong, and bring a suit to avoid his act. Without his joinder, the action would not lie.[2]

The attack, however, was made upon the firm, and its title, if impeached, could be reinstated by any representative of the firm. The joint title is devested only by an act performed on behalf of the firm, and a disposition for any other purpose does not affect the title. The doctrine of estoppel is misapplied. It is the recipient of firm assets who is estopped by the fraud, because he gives no consideration for them to the firm, and not the partner who made them over to him.[3] The partner reclaims the property for the firm, and joins in the action with his innocent co-partner for conformity.[4]

The fact that the partner uses the firm funds to satisfy his separate debt, does not give the creditor any right to retain the property. He can acquire a title only by giving a consideration to the firm.[5] Though all the partners appropriated the firm stock to their separate debts, the concert of action would not justify the disposition, or devest the firm title.[6]

The technical obstacle is removed when the firm is insolvent. The creditors then have a direct remedy against the recipient.[7] The disposition is a fraud upon them. The assignee for creditors also repre-

sents them, and may recover the property from any alienee who cannot make out a title from the firm.

The partner is also liable to his co-partner for his fraudulent act in misusing the firm assets.[8] He must reimburse him for expenditures caused by the misappropriation, and compensate him for any injury which the business may sustain.

1. *Money paid for independent claim out of firm funds recovered in separate actions.* A & B were partners. A & C were sureties on D's bond. C died, and B became his executor. A & B paid the bond out of firm funds. A sued D for moiety. Defence: B should join.—Recovered. A liable at law, and C's estate in equity. Quotas presumed equal, and payment severed according to liability of each. No joinder required in suit for moiety at law. Gould v. Gould, 8 Cow. 168 (1828); s. c. 6 Wend. 263, N. Y. (1830).

A partner's use of firm paper for his individual debt was a fraud on his co-partners, and not on the firm. They must sue for their quotas of loss. Dissent, because fraud on firm, which had the title and should sue.[a]

a. *Separate creditors taking firm note from debtor partner a several fraud on co-partners in proportion to their shares.* A, B, C & D were partners. B gave to E, for a separate debt, his individual note, with the firm's endorsement. Bank discounted it for E. Firm dissolved, and receiver paid the bank. A & F bought out the interests of B, C & D, and took from receiver an assignment of the estate in his hands. A & F sued E for fraud.—Judgment for E. His fraud a separate injury to each partner in proportion to his share in the firm, and founds no joint cause of action in favor of the firm, nor of the plaintiffs as assignees of the firm.—Dissent: E's fraud committed against the firm, and payment by receiver gave him, as trustee for creditors, a cause of action, which passed by his assignment. Calkins v. Smith, 48 N. Y. 614 (1872).

2. If a partner endorsed the receipt of his claim on a note held by the firm, they could not recover without admitting the receipt. The partner is estopped to deny his act, and his estoppel bars a joint suit.[a]

a. *Credit given for individual debt on note to firm, is payment which cannot recovered back.* C & D gave a note to A & B. B was individually indebted to C & D, and endorsed a receipt of his debt of $700 on the note. A & B sued for the full amount—Could not recover, unless they allowed the credit. B, as co-plaintiff, could not take advantage of his own wrong, and his estoppel bars the joint suit. Craig v. Hulschizer, 5 Vr. 363, N. J. (1871).

Any receipt by a partner would bar his firm's recovery. The partner could not be co-plaintiff.[b]

b. A partner's receipt, given for a debt to the firm, in payment of his individual debt to the firm creditor, bars the firm by precluding a joint action to recover the claim. B owed A & D. A gave B a receipt for his debt to the firm, in payment of a debt due by A to B, for groceries. A & D sued B in assumpsit.—Judgment for B. Any relief of the firm against a partner's fraud in paying his individual debt with firm assets, must be in equity; he cannot be a co-plaintiff at law. Homer v. Wood, 11 Cush. 62, Mass. (1853).

3. *Fraudulent receipt given by one of two trustees to a joint debtor no bar to joint suit.* A & B, trustees, sued D for a debt. He produced a receipt given him by A. Plaintiffs proved that the receipt was a fraud on the *cestuy que trust*, and obtained a verdict. Defence: A estopped by his own fraud as much when co-plaintiff as if sole plaintiff. Though D is equal in guilt *potior est conditio possidentis.*—Verdict sustained. D the party estopped by his fraud, because he could not set it up against B. Receipt is only *prima facie* evidence of payment. Skaife v. Jackson, 3 B. & C. 421 (1824).

4. If a firm debtor credited the debt on his judgment against the partner with his consent, the joint title would be unaffected by the credit, and the firm might recover.[a]

a. Record credit of firm claim by plaintiff on judgment against partner no bar to firm action. A & B sued C for merchandise. C had credited his debt to the firm, with B's consent, upon a judgment against B.—Action sustained. Misappropriation void, and joint title unaffected. Purdy v. Powers, 6 Barr 492, Pa. (1847.)

If a partner receipts for a firm claim in payment of his individual debt, the firm can recover in spite of his receipt. The firm title is not affected by the receipt.[b]

b. Payment by partner of his separate debt with partnership receipt, no bar to firm assignee's recovery. B owed C & Co. $112.06 for lumber. A, C & Co.'s assignee, sued B. Defence: Firm receipt given by C in payment of his individual debt to B for groceries.—Recovered. C could be co-plaintiff to reclaim firm title, which was not affected by his attempt to appropriate the claim to his individual debt. Thomas v. Pennrick, 28 Ohio St. 55 (1878).

5. The firm can recover assets paid in satisfaction of a separate debt. Although the separate creditor did not know of the firm's title, yet, as he did not pay a consideration, he acquired no title.[a]

a. Geery v. Cockroft, *supra* §110, n. 11.

Amount of partner's individual note, endorsed by firm creditor, and paid back through his endorsement, not a set-off against his claim. A brought account against his co-partner, B. C & D, trustees of E, sold his claim against A & B to F. Against the claim a firm creditor opposed a set-off. C & D had received A's note, payable to their order, endorsed it, and had it discounted by G, a bank. A had drawn a check on the firm deposit, to pay the note, and had endorsed the check and sent it, with an individual check, to H C & Co. H, without C or D's knowledge, endorsed the firm check, and delivered it to G. He returned the note to A. This payment of A's individual

debt to E's estate out of firm funds was offered as a set-off against F's claim.—Disallowed. G, and not C & D, held the note, and received the check in payment. G, as a *bona fide* purchaser, could not be compelled to refund the firm assets, for he could not be reinstated after he had surrendered the note and released the endorsers. They did not receive the firm funds, although the title passed through them, and by the payment escape only a contingent liability. Moriarty v. Bailey, 46 Conn. 592 (1879).

If firm property is taken in execution, and sold for a separate debt, all the partners can sue for the trespass.[b]

b. *Semble: Partner co-plaintiff in trespass for sale of firm property for his separate debt.* D, separate creditor of C, levied on and sold firm property of A, B & C. They sued D, E, sheriff, and F, auctioneer, for the trespass. Defence, made after trial: Joinder of A.—Recovered. Objection too late. A, probably, a proper party. Bates v. James, 3 Duer 45, N. Y. (1854).

If the firm note includes a separate debt, the payee can recover on the note, but only the firm debt, not the separate debt, though included in the note.[c]

c. *Payee of firm note may recover on it the firm debt, but not a separate debt also included in the note.* C made a note in the name of B, C & Co., to A, who brought suit upon it. B's defence: Part of consideration a debt existing before B joined the firm.—Recovered, because A did know when B became a partner, and cause of action is the note and not the consideration. But consideration being in part for the separate debt of the other partners, was a fraud on B, and barred A's recovery upon the note to that extent. Guild v. Belcher, 119 Mass. 257 (1876).

Contra: The separate debt of all the partners paid with firm funds could not be recovered by the firm. The debt was due from each partner, and they had no equity to recover it.[d] If a partner pays his individual debt with firm funds, his co-partner was estopped from reclaiming the payment by receiving payment of his debt out of the firm assets.[e]

d. *A separate debt of all the partners, paid out of firm assets, cannot be recovered by the firm.* On dissolution, four of the partners continued the business, and retained the bookkeeper, A, to whom the old firm owed $161.90. A carried this amount to his own credit on the books of the new firm, B & Sons. At the end of the first year, A claimed a balance due him of $300, in which he included the $161.90, without knowledge of B & Sons. They gave him a note for $100, and paid him $200 in cash. A sued B & Sons on the note, and for subsequent salary. The defendants having ascertained that $161.90 was due A by the old firm, denied any liability on the note, and reclaimed the $61.90 paid him in cash. Court below gave B & Sons judgment on the note, but allowed plaintiff to retain the $61.90. Defendants appealed.—Judgment affirmed. Defendants, as partners in old firm, were liable, jointly and severally, for its debt, and had no equity to reclaim it. Strong v. Miles, 45 Conn. 52 (1877).

c. Partner waives co-partner's payment of his individual debt with firm funds by receiving them in payment of his own individual debt. B was managing partner of firm, A, B & C, railroad contractors, who dissolved and made B liquidating partner. The title to firm real estate was in D, a railroad company, which conveyed upon B's order. A notified D not to convey, but, on that date, conveyance was made to E, both D and B thinking that A consented to this deed, which was made as security for B's debt to E. D owed firm $22,000, and B transferred one-third of the claim to A, in payment of an individual debt. B had advanced more money for firm debts than the value of this lot. A's assignee brought account, and asked to have the lot applied as partnership assets.—Dismissed. Though payment of individual debt with firm assets, *prima facie*, fraudulent, presumption may be rebutted. A receipt of firm claim for his individual debt estops him from objecting to B's use of firm property to pay his separate debt. Corwin v. Suydam, 24 Ohio St. 209 (1873).

7. If the firm is insolvent when its funds are used to pay the separate creditor, the firm creditor may recover, because it is a fraud on him.[a]

a. Menagh v. Whitwell, *supra* § 103, n. 4.

If a partner transfers firm assets for his separate debt, the firm creditors may recover them. The firm title does not pass, and the firm creditors are entitled to sue.[b]

b. Partner's transfer of firm assets for his separate debt, a fraud on a firm creditor, who may recover the assets directly from the assignee. B & C, partners. B transferred judgments and notes of the firm, for his separate debt, to D, without C's knowledge. The firm was in debt, and became insolvent. E, a firm creditor, obtained judgment, and attached the proceeds collected by D, and in his hands as garnishee.—Judgment for E's claim, which was less than the amount collected by D. The firm title did not pass by D's transfer in fraud of the joint creditors. Hartley v. White, 13 N. 31, Pa. (1880).

8. If a partner uses the firm-name for a separate debt, and the co-partner has to pay a moiety of the debt to release his separate estate from execution, he can recover the payment from his partner. The payment would be under sufficient duress to entitle him to reimbursement.[a]

a. Smith v. Loring, *supra* § 126, n. 1.

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§ 168.

As a partner who uses the firm credit, or firm funds, in payment of his individual indebtedness, commits a fraud upon the firm his co-partner is not bound to dissent.

If a partner converts firm funds to his own use, this is a fraud upon his co-partners, for which, in some jurisdictions, he is liable to a criminal prosecution for embezzlement (§ 143); but he is everywhere responsible to his co-partners in a civil action for such a sum as upon his own account he is shown to have abstracted in excess of his share in the firm property.

Should the creditor be notified by the co-partner of his dissent from the diversion of the firm funds to the payment of the creditor's separate claim? It was said that notice was superfluous, because the creditor had knowledge of the diversion. This is true, and the co-partner need not notify the creditor of the fact which he already knew. Nor must the co-partner give notice of his dissent. It was held at one time in Pennsylvania that unless a protest against the diversion was made, the inference would be drawn of an assent by the co-partner, which would charge the firm.[1] But this position is not sound; he need not forbid the transaction. If a partner gives firm paper for his individual debt, the co-partner is not bound by his unlawful act, which is invalid without being repudiated.[2]

An order drawn by a partner upon a debtor to the firm, and handed by the partner to his individual creditor, would not protect him in the possession of the asset against the firm.[3] The individual creditor, who took possession under the firm order, knew he was getting firm assets in payment of his private debt, and he could not retain them against a reclamation by the firm.

1. *Partner on learning that co-partner has given firm note to pay individual debt must disavow.* B & C were partners; D was their clerk. C was indebted to A, and, upon a settlement with A, gave

him a note signed in the store, and in the presence of C, by D, in the name of the firm. B was absent, but he afterwards knew of the transaction, and did not dissent. A sued B on the note, as surviving partner, after the death of C.—Recovered. SHIPPEN, P. J., in the court below charged, *inter alia*, "And if the defendant knew of this "transaction, as by the books of the firm he should know, and did "not early disavow it, he may be bound by it." Foster v. Andrews, 2 P. & W. 160, Pa. (1830).

2. *Partner not bound, when subsequently informed of the fact, to repudiate a firm note given, without his knowledge, by co-partner for his individual debt.* B & C, partners. C gave a firm note to A, for $1,000. B's defence: Note given to A for C's debt, contracted before B & C formed the partnership. Court charged, that if C's giving the note was not known to B at the time, he must, when afterwards informed of it, repudiate the note within a reasonable time, or be bound by it.—Error. If B did not know of the note when it was given, he would not be charged, although he was subsequently informed and did not repudiate it. Reuben v. Cohen, 48 Cal. 543 (1874).

3. *Partner having knowledge of co-partner's application of firm funds to payment of individual debt not bound to disavow.* A, of the firm A & D, was separately indebted to the firm B & C, and E was indebted to A & D. A drew an order in the name of his firm, in favor of B & C, on E, for bricks, which were delivered. After an unsuccessful action against E on his original indebtedness, A & D sued B & C, in order to follow the property in their hands, on the ground that they received it *mala fide*. Defence: That D was apprised of the order before the bricks were delivered, and did not give notice to the defendants that he would not be bound by it.—Recovered. GIBSON, C. J.: "Want of notice not to deliver, might have been ground "of defence by [E]; but why should [D] have to give notice to the "defendants of what they already knew? In Northouse v. Parker, "1 Camp. 82, it was held that notice would be superfluous where the "fact is known. The defendants knew that [D] was not liable for "[A's] debt, and they had no reason to presume that [D] would con-"sent to have it paid out of the partnership effects, to the prejudice "of himself and the joint creditors. They acted at their peril, and "with their eyes open. * * * The defendants had no ground to pre-"sume that [D] had authorized [A] to draw in their favor, for there is "no circumstance in the case to found a presumption, and it was their "business to inquire. If they took [A's] word for it, they must take "the consequences. When told of the order before the bricks were "delivered, [D] told [E] that it was wrong. But if the defendants "gave a receipt for the separate debt, or delivered up the security "for it when the order was drawn, notice would have been too late to "save them; and if they did not, a recovery in this suit would leave "their right of recourse to [A] intact, and the parties would be re-"mitted to the position which justice requires them to occupy. In "any aspect, whatever, the defendants have no case." McKinney v. Brights, 4 Harris 399, Pa. (1851).

§169.

The joint title is impaired by the misappropriation, and may be re-established by any representative of the firm.

The partners, however, may ratify the appropriation of a credit or asset by a partner to his individual use.

If the partner does not consent, although aware of the payment by a co-partner of his separate debt with the firm assets, suit can be maintained to recover them. An action lies to reclaim the assets, as the firm title was never devested by a joint act of the partners, or for their account.[1]

A firm note for one partner's individual debt, although made by another partner, would not bind the firm. The note would be a guarantee, and, as such, must be made by all the partners.[2]

The partners may validate the transaction by relation, so that the title passes, and subsequent insolvency, it is said, will not devest it.[3]

1. *Firm may recover assets paid by partner for his separate debt, although the co-partner had notice and did not dissent.* B, a physician, attended C, who was a partner in the firm of A & C. B agreed with C to buy firm goods, which were to be set-off, *pro tanto*, to his bill for medical attendance. B bought goods accordingly, and the set-off was actually made. A knew that B was buying on these conditions, but "was not, however, a party to the above agreement, and did not consent thereto." After C's death, A sued B for the amount of goods bought.—Recovered. A had not consented. GORDON, J.: "But this consent is exactly what is necessary in order to "bind a firm to an arrangement by which the partnership assets are "to be taken to pay an individual debt. * * * Knowledge alone "would not be sufficient to bind the other members of the firm "* * * Every one is bound to know that a partner has no right to "appropriate partnership property to the payment of his individual "debts, and if one so deals with him, he must run the risk of the "interposition of partnership rights." Todd v. Lorah, 25 Smith 155, Pa. (1874).

2. Leverson v. Lane, *supra* § 129, n. 5.

3. *Partner may ratify co-partner's payment of his individual debt with firm funds.* C, a member of a firm, transferred to B, his separate creditor, a note belonging to the firm. C then filed a petition in

bankruptcy under the United States Bankruptcy Act of 19th August, 1841, which was then in force, and his partners afterwards, but before a decree, assented to the transaction with B. Suit was brought by the surviving partners and by the assignee in bankruptcy against B for money had and received.—No recovery. BELL, J.: "It is settled "law, that a partner cannot pay his private debts by an application of "the partnership property without the assent of his companions. But "he may do so with their consent; and a subsequeut ratification of "the act is equivalent to a precedent authority." The provisions of the Bankruptcy Act did not interfere with the operation of the rule in this case. Anshutz v. Fitzsimmons, 9 Barr 180, Pa. (1848).

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§170.

The fraud must be committed against the firm.

A preference made to a separate creditor on an assignment for firm creditors is void.

The preference does not vitiate the assignment, but will be stricken out by a creditors' bill.[1] A *pro rata* distribution of the surplus among the separate creditors would be a fraud upon the separate creditors of the partner who was entitled to the larger share, but the fraud would not affect the assignment of the firm for its creditors.[2]

If the continuing firm assumes the debts of the old firm, including them among the liabilities would not vitiate the assignment for creditors. Any debts duly assumed become the debts of the firm, as if originally contracted by it.[3] The assignment of the firm assets by a retiring partner to his co-partner for the payment of firm debts would not make them the separate debts of the continuing partner. Firm creditors cannot by such an assignment be deprived of their priority on the firm fund. The purport of the decision is simply that the assignment does not enable the creditor to

elect the assignee as his separate debtor, and come in on their separate estate in addition to the firm fund.[4]

1. *Preference to separate creditor, though void, does not vitiate firm assignment, which can be attacked only by creditor's bill.* B & C assigned to D, with preferences for certain firm creditors, and for a creditor of D. Firm judgment creditor, A, brought bill to avoid assignment, because of a preference to B's separate creditor.—Dismissed. 1, Preference to separate creditor void, but does not vitiate assignment; 2, Firm creditor cannot attack assignment, except by creditor's bill. Conversely, preference to firm creditor in assignment is good, because separate property is not a trust fund, though primarily liable for separate debts. Nicholson v. Leavitt, 4 Sandf. 252, N. Y. (1850).

2. *Assignment valid against firm creditors, though void against separate creditors.* B & C assigned to D all "their" real and personal estate, for payment of: 1st, firm debts, among them, rents; 2d, separate debts *pro rata.* Their individual indebtedness was unequal. C had no individual property, and B had a leasehold. A, who was judgment-creditor of the firm, sued B, C & D, to set aside assignment as fraudulent.—Judgment for defendants. "Their" limited assignment to firm assets and excluded leasehold, which was B's separate property. "Rents" referred to premises occupied by firm. Equal distribution among separate creditors would be a fraud on them, but did not affect firm creditors. Morrison v. Atwell, 9 Bosw. 503, N. Y. (1862).

Assignment may bind firm creditors, though separate creditors may avoid it. B & C assigned firm stock to D, to pay firm debts, and out of surplus separate debts, *pro rata.* Their separate liabilities were unequal in amount. Firm creditor A attacked assignment as a fraud on separate creditors.—Judgment for B, C & D. Assignment valid, except as to separate creditors. Scott v. Guthrie, 10 Bosw. 408, N. Y. (1863).

3. Turner v. Jaycox, *supra* § 106, n. 9, *b.*

4. *Firm creditors cannot by notice elect to become separate creditors of continuing partner, and avail themselves of his indemnity against firm debts to the retiring partner.* B sold the firm assets to his partner, C, who, in return, gave him a bond to pay the firm debts. Shortly afterwards, a warrant issued against the joint and separate estates of B & C. Before publication, A, the holder of firm paper, notified B & C that he elected to take C as his debtor, and avail himself of C's bond of indemnity.—Separate proof against C rejected. C's bond did not enure to A's benefit. No contract by C to substitute his separate liability for the firm debt; nor any consideration for such a contract. Against C's separate creditors the contract would be fraudulent as a preference. Wild v. Dean, 3 Allen 579, Mass. (1862).

As partner's assignment of firm assets to co-partner upon his agreement to pay the firm debts, does not convert them into his separate debts, non-joinder of the assigning partner is a bar to the firm creditor's bill. A, wife of B, brought a bill against C, to recover loans made to the firm of B & C, which was solvent, and averred B's assignment of the assets to C upon his agreement to pay the firm debts. C demurred, because B was not made a party.—Demurrer sustained. The assignment would not convert the joint debt of B & C into a separate debt of C. Fowle v. Torrey, 125 Mass. 289 (1881).

Contra: Creditor of old firm does not become a creditor of new firm, which takes the assets and assumes the debts of the old. D sold out to his co-partners, B & C, who assumed the debts. They subsequently assigned their joint and separate estates, to pay their debts. A proved for $1,000, as creditor of B, C & D.—Rejected. The contract to pay was with D, and A couldn't sue on it. He didn't release B, C & D, and substitute B & C by contract with each firm. If a separate creditor of each partner, he should exhaust the old firm's assets. Scull v. Alter, 1 Harr. 147, N. J. (1837).

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§171.

The partner is the proprietor of his share, and he may dispose of his interest in the business as he pleases. He may sell, assign, mortgage or pledge it.[1]

If the alienation is absolute, the result is a dissolution of the firm. The power is undoubted, in spite of the consequences of its exercise. If, on the other hand, the alienation is qualified, as in the case of an assignment of a portion of the share, or in the case of a pledge or mortgage, a dissolution does not ensue.[2] The alienee does not take immediate possession of his interest, but leaves the partner in temporary possession and control of the share. As soon as he does assert his right to take possession, a dissolution follows. A partner's share is always intangible; no manual possession can be delivered. The alienee's rights are enforceable only in equity, and his standing is equally good, whether at the time of alienation the partner held his share in actual enjoyment or in expectancy only.[3]

The assignment must be of his share in the partnership, in whole or in part, not his share in a single transaction of the firm, or in a single piece of firm property, whenever this is allowed, its assignment is

subject to the co-partner's general equity, that is to an account.[4] Assignment carries future, but not accrued, profits.[5]

1. *Incoming partner not affected by unrecorded chattel mortgage, which binds only share of mortgagor.* B, trading as the "Furniture Works," executed to A for a debt contracted in the business a chattel mortgage, which was not recorded at the time. C bought a half-interest in the works, agreed to pay half the mortgage debt, and carried on business in partnership with B. C sold out his share to D, E & F, who replaced him in the firm. A brought bill against B, C, D, E & F, to charge B & C personally for the debt,, and to subject the machinery of the works to A's mortgage.—Judgment for all defendants, except B and C. Mortgage not a lien, and bound only B's share, which, on a settlement, turned out to be nothing. Promise of C to B enured to A's benefit. Ringo v. Wing, 5 S. W. Rep'r 787, Ark. (1887).

2. *Assignment of share.* A, B, C & D were partners. D sold portion of his share to defendant, who partook of profits with him. Judgment against firm paid by A, B & C. C sued for contribution.—Defendant not liable, because not a partner. Had he been a partner, plaintiff must have brought account. Murray v. Bogert, 14 Johns 318, N. Y. (1817).

3. Collins' Appeal, *infra* § 172, n. 2.

4. *Partner cannot assign his interest in a particular firm transaction.* B & C owed D $156, and D owed C $120. C discharged the firm debt by a receipt for his individual claim, and by a payment of the balance in cash. C drew a firm check for $156, and after dissolution paid it to his individual creditor, A, without B's knowledge. A sued B & C. B defended.—C's authority at an end before check issued. A, no standing as assignee of C's claim against B on the transaction with D, because the claim could not be separated from the general partnership account. Gale v. Miller, 54 N. Y. 536 (1874).

Partner has the right to sell his share of firm real estate, subject to co-partner's equity. A, B & C, hotel proprietors in partnership. C sold his interest in firm real estate to D. A & B sued to avoid the conveyance, because it injured firm credit. Judgment for defendants. Partners, unlike creditors, have no control over co-partner's disposition, which is always subject to the partner's equity. Treadwell v. Williams, 9 Bosw. 649, N. Y. (1862).

Contra: If suit proceeds only against served partner, judgment does not bind firm property. Mortgage of separate partner's interest in firm land good against subsequent judgment against firm. B, C, D, E & F, mining partners. B and C mortgaged their interests, seven-tenths to A. Subsequently G sued the five partners for supplies furnished the mine, served all but E and F, and recovered judgment against the five. Execution directed against firm assets and separate estates of served partners. Sale under judgment. G bought mortgaged property. A foreclosed, and having bought in the property, brought ejectment against G.—Recovered. No firm title passed under judgment, because all partners not served, and proceedings not under Code Civil Procedure, § 388. The title, had it passed, would still have been subject to the mortgage. The purchaser could be subrogated to the judgment creditor's right against the firm only in equity

and by its process. Golden State &c. Iron Works v. Davidson, 15 Pac. Rep'r 20, Cal. (1887).

The preference obtained by the mortgagee over the firm creditors in this last case, results from treating the partners as tenants in common of the firm property. Upon the theory of joint tenancy, the judgment would have been equally good, but it would have been postponed to the claims of the joint creditors.

5. *Sale of partner's share carries future, but not past, dividends.* B, C, D & E, partners in joint stock company. B assigned his interest to A. Then a dividend was declared on the stock. A assigned to E, and sued C, D & E for the dividend.—Recovered. Transfer of stock to E carried future, but not past, dividends. Harper v. Raymond, 3 Bosw. 29, N. Y. (1858).

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§172.

A partner may mortgage or dispose of his share absolutely.

The right of a partner to dispose of his share, like any other property, is undisputed. The subject-matter is incapable of manual delivery, but the assignment will be sustained in equity.[1] In like manner a mortgage of a partner's interest is valid in equity, and gives the mortgagee a priority over the other separate creditors of the mortgagor. The mortgage may be given in anticipation of the partnership, and will become a valid lien as soon as the relation is established. A partner's assignment of his share to his creditor as security, operates as a mortgage rather than a pledge. The mortgagee has full control of the share for his own protection.[2]

1. *Assignment to co-partner valid, though prohibited to stranger.* A, B & C's contract of partnership provided that a partner should not have power to assign his share to any persons, or to let them inspect the firm books, or interfere with its business, and made any such assignment void as to other co-partners, who might disregard it. B secretly assigned his share to C, but retained the title. Upon B's

death A sued C, as trustee for firm.—Decree for C. No covenant not to assign, and restriction against assignment to strangers. Cassels v. Stewart, 6 App. Cas. 64 (1881).

2. *Pledge or assignment of a share in a projected partnership is valid in equity against claim of other creditors.* G was special partner in G, B & Co. B and C were general partners, D and E clerks, with guaranteed salaries and a share in profits above amounts guaranteed. G stipulated for interest, at 12 per cent., in lieu of profits, and for repayment of his capital in any event. Not observing statutory requirements, he became liable as a general partner. Firm paid its debts in full. A obtained in C. P. a decree, in settlement against B, C, D and E, jointly and severally, for $47,192.70, coupled with a direction that among themselves, B and C should pay, viz.: B, $26,411.15, and C, $20,781.65. E was charged with $18,352.39, as his proportion of firm debts, without reference to G's claim. E died, and G claimed in O. C., payment of $47,192.70 out of E's estate. The fund in O. C. for distribution was the proceeds of E's share in F, a partnership limited. A claimed the proceeds of E's share in F, by a pledge or assignment made before F was formed, to secure a loan for E's contribution.—O. C. divided the fund between A and G. Balance due G, B & Co. by E, was his separate debt, and A's joint and several claim also became, by his election, E's separate debt. Assignment imperfect, there being no partnership in existence for it to operate on, and it being dependent on assignor's will. His executors' preference of A would be a fraud on G. Hulse's Estate, 12 Phila. 130 (1878). 11 W. N. 449 (1882). A appealed. Argument: 1, Assignment for value of a share in a projected partnership invests assignee with right to specific performance, and loan for contribution converts assignor into a trustee. Assignment could not be a fraud on G, because he was an antecedent creditor, who stands in E's shoes. 2, G not a separate creditor, because E's debt was due in part to himself and the balance to his partners, according to their shares. But G is simply a firm creditor, who holds E as surety for B, C and D, and if A is a partner, he is bound by the articles which relieved E from all firm obligations. Defence: Contemplated special partnership abandoned for a partnership limited, and no delivery of share, though feasible, made to A by E. No specific performance against E, if living, except to perfect pledge or assignment, and upon E's refusal. But enforcement would destroy E's control of partnership limited. G claimed E's share, not as collateral security, but as satisfaction. He becomes a purchaser for value by the extinction of his debt *pro tanto*. After E's death, the rights of claimants are fixed. 3, C. P. decree made debt of E to G joint and several, though not a partnership debt, and A could claim as a separate creditor.—Reversed. By the C. P. decree, G's claim against E had been made E's several debt, and its origin has become immaterial. A being a separate creditor can claim only his *pro rata* share with the other unpreferred creditors. A has a valid lien in equity upon the fund by virtue of his mortgage, which gives him a priority. Collins' Appeal, 11 Out. 590, Pa. (1885).

Part III.

The principles according to which the business is wound up.

CHAPTER I.

THE REASONS FOR A DISSOLUTION.

§173.

The business will not be broken up without adequate cause. The fact of partnership must be established and the mischief be irreparable to justify a dissolution.

Dissolution occurs as a matter of course upon the death of a partner,[1] upon the marriage of a single woman, and upon the sale of a partner's interest, whether voluntary or upon execution.[2]

The partnership relation is suspended, but not dissolved, by the lunacy of a partner and by war. [3]

In the cases enumerated, the dissolution occurs without judicial intervention, just as if the partners had dissolved the firm by agreement. In other cases the Court, upon cause shown, will decree a dissolution.[4] Before the Court makes a decree, the fact of partnership must be established,[5] and a sufficient cause must be shown;[6] nothing will be done before answer.[7]

The causes admitted to be sufficient are: *First*, A failure of the undertaking. After the non-success of the business has been demonstrated by actual expe-

rience, or by any sound test, no court will make a partner go on and sink money in a hopeless venture, although the agreed term of partnership has not expired.[8]

Second, Misconduct which excludes the plaintiff from his joint control over the business. No mere incompatibility of temper will be sufficient, unless it results in exclusion.[9]

Third, Insolvency of the partner defendant is a sufficient ground.[10] Insolvency, or insufficient assets to pay one's debts, is not a dissolution of a firm. There may be a tiding over of the deficiency, and a solvent state be established. Until the insolvency ceases to be latent, and becomes overt, causing a suspension of business, there is no dissolution of the firm.

Fourth, Lunacy: If partnership is a relation at will, why couldn't a partner put an end to the contract for the lunacy of his co-partner? The putting him in a committee would be a sort of civil death, and a finding of lunacy by a commission would establish his non-existence. But without either, which would raise the presumption of dissolution, the lunacy would be sufficient ground to justify a dissolution, if desired by the sane partner.[11]

Fifth, The abandonment of the business by a partner is a ground for dissolution.[12]

1. *Death of a common member dissolves both firms, and prevents surviving partners from carrying out a contract between the firms.* B & C, partners as lumber dealers in Chicago, and also with D in a saw-mill, at Muskegon. D and B & C agreed that lumber should be sent from the mill to B & C, who should account for the lumber at market price, and sell it. B died, 11 July, 1871, and D went on sending lumber to C, who did not, as required by statute, close up the business, but continued B & C's name. 9 October, 1871, Chicago fire destroyed contents of lumber-yard, causing a loss, above insurance, of $43,782.19. A, B's executrix, brought bill for account against C's administrators.—Decree. C liable for lumber which he

had received from D, or bought from others, after B's death; but not for the lumber on hand at B's death. Oliver v. Forrester, 96 Ill. 315 (1880).

2. The sale of a share in a partnership for a fixed term, or at will, is only *prima facie* evidence of dissolution.

Partner's sale of his share. A & B were partners. B bought A out and assumed the debts, and subsequently re-sold to C, who likewise assumed the indebtedness, and paid part of it. A applied for a receiver.—Bill dismissed. A had no right over the property after a sale of his interest. Weber v. Defor, 8 How. Pr. 502, N. Y. (1853).

Note to Waller & Davis, 21 Am. L. Reg'r N. S. 711 (1882), by MARSHALL B. ELWELL, Esq.

3. *After dissolution, notice of protest to one partner still sufficient. War dissolves a firm as to future, but not as to past, transactions, but does not revoke an agency to complete a transaction already begun.* A & B, in New Orleans, dissolved. Notes of third persons were taken by B, as his portion of the assets. He lent the notes to C, who bought A's share of stock, and gave them in part payment. The notes were endorsed A & B, and C added endorsement of C & D, a new firm, to which C contributed the stock purchased of A. Articles made partnership between C & D contingent upon B's joining the firm, but C & D carried on business for a month, when C returned to his home, in New York, having first made E his attorney, *inter alia*, to receive notice of protest. B never did join. The war broke out immediately. The notes were protested, and notice served on D and E. After the war, A sued C. Defence: Endorsement not binding, because no partnership; if binding, the contract was suspended by the war; if a partnership, it was dissolved, and notice should be served on each partner. E's agency revoked by the war.—C's endorsement bound him, whether a partner or not. A might sue, although a prior endorser. Dissolution referred only to the future. The position of the parties to the endorsement continued unchanged, and even after dissolution notice to one was notice to all. E's agency not revoked. Hubbard v. Matthews, 54 N. Y. 43 (1873).

4. *Supra* Sloan v. Moore, § 114, n. 1.

5. *No decree for receiver until partnership established.* A brought bill against B to recover firm property, and asked for receiver and injunction. Evidence as to partnership was conflicting.—Dismissed, because the fact of partnership was in doubt. Goulding v. Bain, 4 Sandf. 716, N. Y. (1852).

6. *Court will not decree dissolution without cause shown.* Partnership for five years. Motion to dissolve. No cause proved.—Motion refused. Henn v. Walsh, 2 Edw. Ch. 129, N. Y. (1833).

7. The defendant partner has a right to the possession and control, which will not be taken away from him without sufficient ground, and not until after answer.[a] If the answer denies the plaintiff's partnership in a branch of the business, the injunction, when justified, will be restricted to the partnership business, which is admitted.[b]

a. *Court will not enjoin managing partner before answer.* A cultivated plants, and B sold them in New York. A asked for preliminary in-

junction, alleging that B refused to account, and would not permit him to inspect the books.—Refused. B had, by the arrangement, charge of sales and proceeds. His function would not be disturbed before answer. Petit v. Chevelier, 2 Beas. 181, N. J. (1860).

b. *No injunction if partnership dissolved.* A & B engaged in mining. A, who was entitled to dissolution, enjoined B. He denied partnership in "separating works" for smelting the ore mined.—Injunction dissolved against "separating works," and regulated as to mining, so that they might take out ore. Wilson v. Fichter, 3 Stock Ch. 71, N. J. (1855).

8. *Failure of undertaking ground for dissolution.* Three persons owned an island in the Carribbean Sea. They sold half to B for $30,000, raised a working capital of $20,000, and gave him full management and control of the island, for sale or lease on joint account. B sold out to A, who bought an additional fourth, the remaing fourth having been bought by C. A applied for dissolution and account. The operation failed within a year and a half, and the concern lost $5,000. C was individually indebted to A for $20,000. C objected that the undertaking could not be abandoned, except by mutual consent, until the land was sold or leased.—Dissolution. As no period had been fixed for its duration, the partnership was only at will. Wood v. Warner, 2 McCart. 81, N. J. (1862).

Losses beyond stipulated contribution justify partner in dissolving partnership. In 1871, by articles, B agreed with A, to furnish capital of $5,000, and improvements necessary to carry on a grist-mill, and to pay A $200 a month, and enough more to give him one-half net profits. Business was to continue until 1875, unless it did not pay expenses by 1873. $5,000 sunk by 1872, and B closed up the business. A sued for salary to 1873, and for profits.—Verdict for salary sustained, but set aside for prospective profits, as B not bound to sink more than $5,000. Hill v. Smally, 8 Vr. 103, N. J. (1874).

9. *Failure of enterprise and partner's misconduct ground for dissolution before expiration of term.* A & B, each contributed $4,000 to a partnership for twenty-five years, to manufacture lead-pencils. Within a year the business proved a failure, although A had advanced $200,000. B bought materials in excess, secretly carried off stock and sold it, suffered judgments against the firm, and had its assets taken by execution without A's knowledge. A refused to advance more capital, and B had none. A obtained injunction, and B moved to dissolve it.—Injunction continued, and receiver appointed. Profits, the object of partnership, couldn't be made without capital or co-operation of partners. B's misconduct an independent ground. A also entitled as a creditor, as he couldn't sue at law. Seighortner v. Weissenborn, 5 C. E. Gr. 172, N. J. (1869).

10. *Insolvency of partner ground for appointment of receiver.* A & B dissolved, and A enjoined B on charge of fraud and of insolvency, and asked for receiver. B claimed to have advanced $20,000, but was unable to show items, though he kept books.—Appointed. B's insolvency sufficient ground for appointment of receiver, and his suspicious claim additional reason. Randell v. Morrell, 2 C. E. Gr. 343, N. J. (1866).

11. *Lunacy of one partner gives either partner the right to dissolve.* A & B went into partnership for a term of fourteen years, either partner to have the right to dissolve, on notice, at the end of seven years, viz., March 31, 1874. A became insane. B gave notice of dissolution

September 17, 1873, but, on 28 March, 1874, withdrew the notice. Subsequently, A, by his next friend, brought bill to dissolve and for a receiver, on the ground of A's permanent insanity. Defence: A has not been judicially declared a lunatic.—Decree. B could not withdraw his notice of dissolution; but if he could, Equity would still decree dissolution in the interest of a lunatic, and appoint a receiver pending the appointment of a committee. The sane partner has no right to sole control where lunacy of the other intervenes to alter the position of the parties. Jones v. Lloyd, L. R. 18 Eq. 265 (1874).

12. *Absconding partner not necessarily co-defendant. Attachment on mesne process creates lien.* A attached B, debtor of C & D, and effected service upon C, who then took benefit of insolvent law. D absconded.—Creditor's lien by attachment cut out assignee. D's absconding justified suit and judgment against C alone for firm debt. Thomas v. Brown, 10 Atlantic Rep'r 713, Md. (1887).

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§174.

The remedy of a partner for a dissolution caused by his copartner before the term has expired is an action for the injury.[1]

He may recover damages for the breach of the contract, and they will be measured by the profits made during the preceding months of the partnership, and not mitigated by the plaintiff's profits made in a new business begun before the term expired.[2]

1. But subject to action for damages, a partnership for a term may be dissolved at will.[a] Article entitled: "Power of partner to withdraw at will from partnership entered into for a definite period," by Benjamin F. Rex, Esq., 23 Am. L. Reg'r 689, 1884.

a. *Partnership for term may be dissolved at will. Local item sufficient notice for non-customer.* B & C made in July a contract for partnership business as jewelers, at Ishpennig, for one year, and began business in August. At end of October, B took possession of stock, and had item put in local column of newspaper announcing dissolution. C subsequently bought merchandise in Chicago of A, who had no previous dealings with the firm, and gave him note in suit for price.—Judgment for B. Dissolution at will, in spite of term. Notice sufficient. Solomon v. Kirkwood, 55 Mich. 256 (1884).

2. *Damages for dissolution.* By articles, three months' notice required for dissolution. B dissolved without notice, and A sued for damages. —Recovered. Measure of damages prospective profits of past six

months, and not mitigated by A's profits in another business during the three months. Bayley v. Smith, 10 N. Y. 489 (1853).

CHAPTER II.

HOW DISSOLUTION IS BROUGHT ABOUT.

§175.

Notice of dissolution must be given, except when caused by death,[1] in order to terminate a partner's implied authority to bind his co-partner.[2]

No special form of notice is fixed by law, but any information given for the purpose and understood to be intended for notice, will answer the requirement.[3] Need not be by publication or advertisement.[4]

1. *Dissolution by death requires no notice.* Prior to the death of a partner the firm employed the plaintiff to furnish iron work for a cotton and woollen factory. The work was begun in his life-time.—A general contract for work at a given rate is excluded, as it might be indefinite in amount. The deceased partner's estate is liable for pending work, if specific in character, until the job is completed under a contract entered into during his life-time, but not for any other contract entered into by his partners on behalf of the firm. Caldwell v. Stileman, 1 Rawle 212, Pa. (1829).

2. *Note given by partner to firm creditor without notice of dissolution, binds a partner.* After dissolution, B gave note in firm name of B & C to A, who had no notice of dissolution. Defence by C: B's authority ceased at dissolution.—Judgment for A. Note charged B, because no notice of dissolution. Clement v. Clement, 35 N. W. Rep'r 17, Wis. (1887).

3. *Notice of dissolution need not be formal.* Judge charged that casual conversation in the street was not notice of dissolution, unless understood to be intended for notice.—Reversed. Any actual notice is sufficient. Davis v. Keyes, 38 N. Y. 94 (1868).

Assignment for creditor by surviving partner, exceeds his power, but cannot be attacked collaterally if approved by court. B, partner of C & D died, making E his executor. C & D assigned for creditors in a Louisiana court, which accepted assignment and appointed F syndic. A attached stock in United States Marshal's custody for

firm debt. F applied to dissolve attachment, and E joined in opposition.—Dissolved. Surviving partners have no power in Louisiana to dispose of firm property which is held in common by executor and survivors; but decree accepting assignment a judgment which could not be collaterally attacked. Tua v. Carriere, 117 U. S. R. 201 (1886).

4. Note to Uhl v. Harvey, by W. W. THORNTON, Esq., 21 Am. L. Reg'r 127 (1882).

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§176.

The kind of notice varies with the class of persons to be notified.

They may be classified as follows: *First*, The new customers. *Second*, The old customers. *Third*, The customers of particular partners.[1]

An advertisement at the place where the business is carried on, is sufficient notice for persons who have had no dealings with the firm.[2]

1. The lease by a firm is not a trade contract, and charges only the actual occupants.

Retiring partner not bound to notify lessor. A let premises for three years to B, C & D, with option to renew. During the term, D sold out to B & C. Then C sold to F, who formed a new partnership with B. They held over one year, and then gave up the premises to A, who refused to accept the surrender, and sued B, C & D for the rent, as upon a renewal of the term.—Judgment for C & D. By dissolution and departure, C & D freed themselves from liability or connection with the premises for more than the expiring term. By receipt of rent from B & E, A acknowledged a change of tenants. James v. Pope, 19 N. Y. 324 (1859).

2. As to strangers they are not entitled to any personal notice of the dissolution, but are bound by the fact. They could not rely upon information obtained by enquiry, that the defendant was a partner.[a]

a. *New customer can't hold retired partner, though dissolution made without advertisement, and business continued with an incoming partner of the same name.* B & C dissolved, and notified all customers, but did not advertise the dissolution. B's son took his place, and the new firm continued the business as B & C, using the bill-heads with B, Sr.'s, name on them. A, who knew nothing of the bill-heads, inquired of neighboring firms, and was told that B, Sr., was the partner. A sued B, Sr., upon a firm note, taken from C, for

merchandise sold to B & C, in reliance upon this information; B, Sr., defended.—Not liable. Cook v. Penrhyn Slate Co., 36 Ohio 135 (1880).

Notice of dissolution published and sent to customers sufficient to terminate partnership. Dissolution of B & Co. was published in London Gazette, and the notice sent to all the customers of the firm. C, a partner, carried on business as B & Co. A sued B on draft of new firm of B & Co.—Not liable. Publication gave sufficient notice of dissolution. Newsome v. Coles, 2 Camp. 617 (1811).

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§177.

Customers of the firm must have actual notice of the dissolution.[1]

The only safe course would be to send a circular to the customers, and get an acknowledgement of its receipt, as actual notice must be brought home to every customer of the firm. Mailing a copy of the advertisement, announcing the dissolution, would be *prima facie* notice; but if the receipt of the advertisement were denied, proof of actual notice would be necessary, in order to exonerate the partner for the acts of his co-partners since the dissolution.[2]

A customer is one who deals directly with the firm. The purchaser of firm paper is not a customer, and the habit of discounting firm paper does not make him a customer.[3]

Customers dealing with the firm upon the credit of a person who suffered himself to be held out as a partner, must be notified.[4] The other customers of the firm could not hold him, either with or without notice.[5]

1. *Notice of dissolution must be brought home to old customers.* A & C were partners as stone-masons. A sold B quarrying tools to be paid for with stone. B afterwards delivered the stones to A, who ac-

cepted them, and used them for his own purposes. Before B delivered the stones, the firm dissolved, but B never received actual notice. A & C brought assumpsit against B, to the use of C, for the price of the tools. A letter was offered in evidence, announcing the dissolution, mailed to the address of the defendant, a customer, who had previously dealt with the firm, and no return of the letter from the dead-letter office. Notice by post is restricted to commercial paper, and don't extend to other business relations. With corroborative evidence it might be sufficient for jury to infer actual notice, but nothing short of actual notice will exonerate partners.—Judgment reversed. (SHARSWOOD, J., dissented from the point as to notice of dissolution). Kenney v. Altvater, 27 Smith 34, Pa. (1874).

Actual notice of the dissolution is required to every customer of the firm. The father was in a firm, and his son was acting in his place. The father bought out the other members, and gave the business to his son, who acted as he had previously. The firm name was changed from Newcomet & Co. to W. N. Newcomet, but the creditors of the old firm relied upon its continuance and did not observe the change in the checks.—They were entitled to notice, though a stranger would not have been. Newcomet v. Brotzman, 19 Smith 185, Pa. (1871).

2. *Mailing advertisement not notice of dissolution if receipt denied.* B, C & D, trading in Toledo as B, C & Co., employed E as purchasing agent in Detroit. D retired, published dissolution in Detroit, and mailed advertisement to F. B & C continued to employ E, who swore he never received it, and gave him a note for services, subsequent to dissolution. He endorsed to A, who sued the three. D's defence: Mailing advertisement sufficient notice.—Recovered. Notice to old customers must be actual. Mailing affords presumption which is rebutted by denial. Austin v. Holland, 69 N. Y. 571 (1877).

3. *Purchaser of firm paper from a third person, is not a customer of the firm, and is entitled to general, not personal, notice of dissolution.* B retired from the firm, B, C & Co., without advertising dissolution. B gave accommodation note, in firm name, to D, who knew of the retirement. A, who had previously bought the firm's paper, discounted the note for D. A sued B, C & Co.—Judgment for A. Though prior dealings in firm paper did not make A an old customer, he was entitled to general notice by advertisement. City Bank of Brooklyn v. McChesney, 20 N. Y. 240 (1859).

4. *Notice of dissolution necessary to prevent firm's incurring liability.* B & Sons, who ran a stage line, dissolved in 1825, but the members retained shares in the company, which continued the business. B requested gate-keeper of A to pass stages over turnpike, and charge toll to B & Sons. A rendered account to B & Sons for 1825 and 1826. B died, and A sued sons as surviving partners, and obtained verdict. —Sustained. Plaintiff had no notice of dissolution. Princeton & Kingston Turnpike Co. v. Gulick, 1 Harr. 161, N. J. (1837).

The name of a partner in the firm designation is an announcement which every customer of the firm relies on as a representation of membership.

Ostensible partner must give actual notice of dissolution, even to customers who did not know of his connection with the firm. B & C signed certificates, as bankers, in State Department. In 1865, C sold out to B. Dissolution was noted on the certificate, and advertised. A made deposits before and after dissolution, and rate of interest was increased on both in 1870. A, who received no actual notice of dis-

solution, hearing that C had been a partner, sued him for principal and increased interest. Defence:. Publication equivalent to notice. Increase in rate of interest on previous deposit unauthorized, and subsequent deposits B's sole debt.—Recovered. C having been an ostensible partner, liable after dissolution, because he failed to give actual notice. Howell v. Adams, 68 N. Y. 315 (1877).

5. *A new customer cannot charge a partner after dissolution.* B entered at a Trenton banking-house, signatures of B & C., to give his brother, C, credit, in 1843. C kept a country store on land near Trenton, but broke up business, and shipped his stock to Philadelphia. Eleven years afterwards, he drew a note in name of B & Co., and had it discounted by bank A, in Philadelphia. A sued B. Defence: No partnership.—Had there been a partnership, A was not a customer, and not entitled to notice of dissolution. F. & M. Bank v. Green, 1 Vr. 366, N. J. (1863).

CHAPTER III.

THE EFFECT OF DISSOLUTION.

§178.

The dissolution *per se* puts an end to a partner's authority to bind his co-partners.[1]

As a partner's authority continues until dissolution, it is necessary to prove a dissolution, in order to take away the partner's right to continue the business. If the business is broken up by a sale of the stock and a removal from the city of one partner, the remaining partners can bind him by commercial paper. The suspension might be temporary, although succeeded by another firm at the old stand.[2]

A partner, upon dissolution, is *functus officio*,[3] and has no authority to charge his co-partners by a contract. If he made a firm note in order to raise money

to pay firm debts, the other partners would not be liable on the note, even if the proceeds were expended in paying the firm debts. By a dissolution the partners do not become simply joint debtors, or joint creditors, but remain partners as to past transactions, and third persons are entitled to treat them as such.[4] The change in their position affects only future acts, whether entirely new or modification of former transactions.[5]

He could not admit a firm debt already barred by the statute of limitations, or restore a firm obligation by his acknowledgement.[6] Nor would part payment by a joint debtor affect his co-obligor.[7]

1. *A dissolution by a sheriff's sale revokes the mutual agency; and neither partner can deprive his co-partner of the statutory protection by an acknowledgement of the firm debt.* B & C, partners, bought flour of A, and gave firm note for the price. Firm was sold out by sheriff, in 1852. In 1855, B renewed note to A in the firm name. About 1860, A sued B & C. Defence by C: Statute of limitations.—Judgment for C. Execution dissolved the firm, and no assets for liquidation. B's authority had expired. Reppert v. Colvin, 12 Wright, 248, Pa. (1864).

After dissolution appearance of partner for his co-partner is not binding. After A & B dissolved, B authorized attorney to enter appearance for firm in suit by C; who obtained judgment. A & B brought bill to avoid judgment.—Dismissed as to B. Judgment opened as to A, who was let into a defence. Templar v. Bank, 26 Fed. Rep'r 580 (1886).

2. *Notice of dissolution not imputed to creditor.* B & D, at Portland, succeeded B & C in business, and entered collections and payments made for B & C in their books. A's bank, which had discounted B & C's note on 10th May, 1834, sued on the last renewal, dated 28th October, 1836, which E endorsed for accommodation, and the bank discounted. At the trial, the judge imputed knowledge of the dissolution to E, who endorsed the renewal, but not the original note, and to the bank. The transfer of business would not escape anybody in Portland.—Error. The court could not infer the fact of dissolution, and the knowledge of it must be brought home to the taker of the original note. The business might be only suspended, and did not continue for liquidation. B, as liquidating partner, could make the note. Brown v. Clark, 2 Harris 469, Pa. (1850).

3. *After dissolution, partner cannot bind his co-partner by admission.* C sold out to B, who gave note to A in name of B & C. A sued on the note. Defence by C: Dissolution, and notice to A. On trial A called B, who testified to dissolution and notice to A before note was given. In rebuttal: A read in evidence an unsigned paper in B's hand-

writing, stating that A had no notice of dissolution when note was given. Judgment for A.—Reversed. Paper incompetent to bind C, as an admission, because B's authority ceased upon dissolution; incompetent to contradict B's testimony in chief, because A could not impeach his own witness. Nichols v. White, 85 N. Y. 531 (1881).

4. A *partner may negotiate firm paper with stranger's accommodation endorsement until dissolution, and afterwards if no notice.* B endorsed blank form of promissory note for C & D, partners for term of three years. B brought bill for dissolution, and C answered that he too wished to dissolve. Then C filled up form as a firm note, and delivered it to A for a firm debt. B's defence: Firm dissolved by answer, and C no authority to make note.—Judgment for A. No dissolution until decree, and B liable in either event, unless A knew that endorsement was made for the benefit of C & D as a going firm. Smith v. Mulock, 1 Roberts 569, N. Y. (1863).

Creditors with notice of dissolution cannot hold the firm on a note made by an other than a liquidating partner. A partnership association carried on a country store as "The Farmer's Union," and A sued the company on a note given by B, a member, for money lent and used to pay its debts. Defendants offered to prove a dissolution with A's knowledge of it, and that B was not liquidating partner. Rejected and verdict for A.—Judgment reversed. Without authority conferred by the co-partners, no member of the dissolved firm, except the liquidating partner, can bind them even for a settlement of the business. McCowin v. Cubbison, 22 Smith 358, Pa. (1872).

5. *After dissolution either partner may collect firm claim.* C retired without selling his interest, and settled firm claim of $1,525 against D for $700. A became receiver, and sued D for whole sum, alleging that D had notice of C's retirement.—Judgment for A for $125.—Notice immaterial. C not having sold his interest, might collect firm claim. Jury found settlement fraudulent to extent of $125. Fettretch v. Armstrong, 5 Rob. 339, N. Y. (1868).

Demand of one partner on firm note sufficient. B & C gave firm note to A, with D as endorser. No place of payment named. Firm put in bankruptcy. Notary made demand at last place of business, and of B personally. A sued D. Defence: Should have made demand of C also.—Recovered. If co-makers, not partners, demand must be made of all; but if partners, demand of one sufficient. Gates v. Beecher, 60 N. Y. 518 (1875).

Partners may divide claims, and, if debtors assent to severance, one partner may sue alone. On dissolution, debtor to firm which divided its claims between the partners, A & B, promised to pay A. He sued for the debt.—Entitled to recover. Blair v. Snover, 5 Hal. 153, N. J. (1828).

Partners may sever obligation to pay creditors, and they will be bound by the severance. B & C, partners. B retired, and sold out for $700, to C, who took the firm assets of $9,000. Each agreed to pay his half of the firm debts, which were about $1,500. C believed himself solvent, but it appears after about five months that he was insolvent at the time. A, appointed receiver of B & C, and also of C, applied to set aside chattel mortgages and assignment for his creditors.—Judgment for defendants. Sale in good faith a severance of assets, and agreement of each partner to pay half the debts a substitute for his equity. Stanton v. Westover, 101 N. Y. 265 (1886).

6. *Partner's acknowledgement of debt not binding on co-partner after dissolution.* B & C gave note to A, in 1816, and shortly after dis-

solved. In 1824, A sued on the note. B pleaded Statute of Limitations. C let judgment go by default against himself, and testified on trial that the note was due and unpaid.—Judgment for B. Levy v. Cadet, 17 S. & R. 126, Pa. (1827).

7. *Partial payment by partner after dissolution and notice, does not toll Statute of Limitations against co-partner.* B & C gave note to A in 1864. Partnership dissolved in that year. A received notice of the dissolution in July, 1868. C made payments on account of the note, in June, 1868, July, 1870, and November, 1871. In 1876, A brought suit on the note. Defence by B: Statute of Limitations.—Judgment for B. Mayberry v. Willoughby, 5 Neb. 368 (1877).

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§179.

Upon a dissolution, the joint title is divided into separate titles.

But the dissolution must be consummated. When a contract is made to divide the assets, and it is followed by a separation of them into lots, neither partner acquires title until the contract is executed. Each partner must deliver one lot to the other.[1]

1. Konigsburg v. Launitz, *supra* § 101, n. 1.
Firm title not changed into separate ownership until agreement for dissolution executed. A & B, jewelers, agreed to dissolve partnership, and divided the assets between them. B refused to sign agreement, and A obtained injunction, but B sold assets, and refused to pay proceeds to receiver. On attachment for contempt, B claimed to have sold only his separate property.—Committed. Title to firm property not superceded until agreement executed. Fitzgerald v. Christl, 5 C. E. Gr. 90, N. J. (1869).

CHAPTER IV.

THE APPOINTMENT OF A RECEIVER.

§180.

The appointment of a receiver in not a necessary consequence of a dissolution by judicial decree.

Unless cause is shown why the business should be taken out of the hands of a partner, he will be allowed to wind up the business on account of his experience and of expense saved to the firm.[1]

Sufficient ground to displace a partner, who is entitled to administer, is a pre-requisite for the appointment of a receiver. Unless he acts in bad faith, violates his agreement, attempts to break up the business, or is insolvent, his right will not be taken away.[2] Bad faith or fraud will deprive him of the right. A partner, like any owner, may prevent waste by a copartner.[4]

If the court cannot effect a liquidation by one partner, or the business itself should be continued in order to preserve a valuable good-will, the partners are given a chance to compete for the business, which is sold to the highest bidder. The assets are valued according to what they are worth to the partner continuing the business at the old stand.[5]

1. *Appointment of receiver not made, of course, against will of capitalist partner.* A & B, partners at will. B advanced capital, and business carried on in his name. A enjoined B from excluding him, and demanded appointment of receiver. B denied exclusion.—Injunction dissolved, and appointment refused. No reason for taking business out of B's hands. He owned the capital and stock, and, therefore, reason for appointment of receiver, *i. e.*, equal rights of partners don't apply. Cox v. Peters, 2 Beas. 39. N. J. (1860).

Unprofitableness of business ground for dissolution, but not for a receiver. A enjoined B and asked for appointment of receiver. B

denied cause for injunction, and claimed right to settle up business himself. Injunction dissolved, and appoinment refused. If business unprofitable, expense saved by partner's liquidation. Moies v. O'Neill, 8 C. E. Gr. 207, N. J. (1873).

2. Birdsall v. Cole, *supra* § 101, n. 1.

No receiver appointed unless partner has violated agreement. B owned site, and sold half to A, and they built and furnished a paper-mill. A enjoined B, because he sold paper on own account, refused information, and carried off firm books. B explained that A gave him a mortgage for $400, but finding on statement of account that debt was $1,000, agreed to let B sell goods on own account, to make up balance.—Appointment of receiver refused. Parkhurst v. Muir, 3 Hal. Ch. 307 (1848). On reference to master, he is limited to account since settlement, unless bill amended to pray account from beginning. 3 Hal. Ch. 555, N. J. (1849).

3. *Evidence of partner's intention to break up business ground for appointment of receiver.* A enjoined B, his co-partner, who transferred his separate personal property to his son, and gave notice of the transfer to a commercial agency, with intent, A alleged, of impairing firm credit, and A asked for receiver.—Appointed. Other facts, not denied, also showed B's intention to break up the business. Sutro v. Wagner, 8 C. E. Gr. 388, N. J. (1873).

Conversion of firm assets and withholding information, ground for appointment of a receiver, if believed. A charged that B converted assets to his own use, while A was insane, withheld information, and did not keep correct accounts. B denied A's insanity, and all fraud.—Facts supported A's equity below, B's defence above. Doughty v. Doughty, 3 Hal. Ch. 227, N. J. (1848).

4. *Injunction by co-owner to prevent waste, and security for his share of rents.* A & B owned a printing-office. B used it for printing paper. A brought bill for division, or sale of property, an accounts of rents and profits, and injunction against B's injuring premises.—Injunction to prevent waste and security for rents from B. Low v. Holmes, 2 C. E. Gr., N. J. (1864).

5. *On dissolution court will compel partners to bid for the stock and good-will.* Brothers in partnership fell out, and business couldn't be conducted with comfort or advantage. The court below appointed a receiver.—Reversed. The Supreme Court, in order to preserve the business established by the joint enterprise and contribution, gave it to the highest bidder. Slemmer's Appeal, 8 Smith 168, Pa. (1868).

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§181.

The appointment of a receiver is a matter of course against the vendee of a partner's share.

The vendee was never selected by the plaintiff, and has no claim to manage the business.[1]

The vendee of a partner has less right than his vendor to ask for the appointment of a receiver, as he buys only a right to compel a settlement, and not a right of joint control;[2] but if he made out a sufficient ground for the appointment the court would put a receiver in the defendant partner's place.

1. *Appointment of receiver, of course, against partner's vendee.* A & B agreed to manufacture cotton, and to contribute equally. They bought mill for $1,000. A paid $600, B $125, and agreed to make up difference. B sold out to C, who knew B had not paid up his quota. C claimed 1-2, and took possession of and manufactured shingles. B was insolvent, and C refused to pay any debts. A enjoined him, and asked for a receiver.—Appointment. A plain case. Heathcot v. Ravenscroft, 2 Hal. C. 113, N. J. (1847).
   Van Rensalaer v. Emery, *supra* § 101, n. 1.

2. *Purchaser of a partner's interest no better claim to injunction or receiver than a partner.* A, B & C, manufacturers under a patent. Firm property worth $21,000, liabilities $16,000. B had put in and drawn out $10,000, and C had withdrawn $18,000. Judgment obtained against C, and his interest sold by sheriff to A, for $30. A asked injunction and receiver.—Refused. Though sale dissolved partnership, B might settle up business. His charge, that A was not a *bona fide* purchaser, and that he conspired with C to break up business, to deprive B of patent, would prevent aid to them by chancellor. Renton v. Chaplain, 1 Stock. 62, N. J. (1852).

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§ 182

A partner may forfeit his right to the appointment of a receiver by laches.

Unless the application is made at once upon the happening of the cause, the plaintiff is deemed to have waived his right to insist upon it as a ground for the appointment.[1]

1. *Laches deprives complainant of right to appointment of receiver.* A brought bill against B, April 9, and notified him of application to be made for receiver, April 16. Counsel agreed to let the matter go over, and A notified B, July 31, of renewal to be made August 1. B required adequate notice.—Refused. Delay a ground for non-appointment. Tibbals v. Sargeant, 1 McCart. 449, N. J. (1862).

CHAPTER V.

LIQUIDATION.

§183.

The only way to bind the partners after dissolution is by proof that the partner is entitled to keep the firm in existence for the purpose of settlement.

This is the function of a liquidating partner.

1. McCowin v. Cubbison, *supra* § 178, n. 4.
Soliciting trade from receiver an interference. B appointed receiver of A & B. A's son, who had been employed by firm, took list of customers and solicited trade, announcing appointment as a break-up of the firm business.—Committed for contempt in interfering with receiver, who kept the business as a going concern. Helmore v. Smith, 25 Ch. D. 449 (1885).

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§184.

The liquidating partner has the firm's capacity to do what is requisite for a settlement of the business.

He is the firm for liquidation. He may sell on credit.[1] As he continues the firm for liquidation, he may exert the firm's discretion.[2] Commercial paper is an incident to the liquidation.[3] He can make a chattel mortgage where the seal is treated as surplusage.[4]

In New York the liquidating partner is denied the capacity to make commercial paper. From the limitation of his power, it resulted that his note merged the firm debt and precluded the creditor's recovery against the other partners.[5] Elsewhere a note in his name is

simply ambiguous. The form is not notice by construction of law of an individual transaction, but the character of the paper is a fact for the jury.[6] The note might be in his capacity of liquidating partner, when the firm would receive the proceeds, or it might be his individual contract, which both parties intended as a substitute for the firm contract.

1. *Liquidating partner may sell on credit.* On dissolution of a firm, composed of A, B, C & D, carriage makers, C & D were made liquidating partners. They sold a carriage to a hack-driver on credit. A & B surcharged them with the loss incurred by this sale. No custom of the firm was proved of making sales on credit, and although occasional sales were so made, a chattel mortgage or lease was ordinarily taken, where the law permitted it, as security.—Surcharge stricken out. The liquidating partner's discretion is unlimited in making a settlement of the business. Although an error of judgment, the sale on credit was made in good faith. Petry's Appeal, 11 W. N. 512, Pa. (1882).

2. *Surviving partner may exert an option to renew a lease to the firm.* A & B, partners, took a lease for three years from C, with an option to renew for two years. B died, and A exerted the option, but C refused to extend the term, and A sued for breach. Defence: A could renew only as a partner, and by so doing he would be enabled, after dissolution, to charge the firm for rent.—Judgment for A. He succeeded to all firm rights, and his relations to B's estate do not concern the lessor. Betts v. June, 51 N. Y. 274 (1873).

3. *Partnership without a term is at will. A partner need not contribute for stock taken by his co-partners in a corporation projected with his concurrence, to develop the firm's interest. After dissolution a partner is not trustee for his co-partners, unless he makes profits by transacting the same business. Partner may discount firm paper to repay his advances.* A, B & C, partners, sold half a patent right for New York and New Jersey, to D, and agreed with him to form a corporation for working the territory. D arranged with B & C to assess the price which he paid, upon each, according to his share of the corporate stock. The project fell through. A retired from the firm, and bought up D's half, and also the firm's half of an independent claimant from the original patentees. A did business in New York and New Jersey, but at a loss. To repay his advances to the firm, he had its notes discounted, and charged it with the discount. A brought account against B & C.—As duration of the firm was not fixed, A was not liable for breaking it up. He could not be charged the price he paid for C's half of the patent right, nor could B & C be allowed the amounts which they subscribed to the projected corporation. The discount paid by A was allowed. Fletcher v. Reed, 125 Mass. 312 (1881).

Partner's denial of liability on commercial paper made in firm name, puts burden on plaintiff. B & C dissolved, and by notice authorized either partner to use the firm name in liquidation. B took in settlement from D, a firm debtor, a note payable to the order of

B & C, in liquidation, and endorsed it in like manner to A, who sued B & C, as endorsers. Defence by C: Endorsement not made in liquidation. Charge: Burden of proof on C.—Reversed. On denial of liability, burden of proof on A. Woodson v. Wood, 37 Alb. Law Journal, 389 Va. (1888).

4. *Partner may bind firm by a chattel mortgage after dissolution, if mortgagee has notice of it.* B made a note, and executed a chattel mortgage, in B & C's name, to E, for a firm debt, November, 1877. The firm dissolved in 1876. In December, 1877, C sold to D horses, which had belonged to the firm. A, E's assignee, for value, replevied the horses. Defence: Note and mortgage made after dissolution, without C's knowledge, and after title to horses had vested in C.—Recovered. B could bind firm by a chattel mortgage, because the seal is surplusage, and as E had no notice of the dissolution, he could rely upon B's authority. Woodruff v. King, 47 Wis. 261 (1879).

5. *Satisfaction of firm debt by individual note of liquidating partner.* B, as liquidating partner of B, C & D, gave A his individual note for a firm note, which B took up and destroyed. He credited himself on the firm books with the payment of the debt. B, not paying in full, A sued B, C & D for the balance of the original claim.—Judgment for C & D. A took B's note in satisfaction of the firm note, and the change of debtors was sufficient consideration for the substitution. Waydell v. Luer, 3 Denio 410, N. Y. (1846).

6. *Jury must find whether note of liquidating partner was given on firm or on separate account.* B, C & D dissolved in May, and appointed B liquidating partner. He made in August, but ante-dated, notes in his name, payable to the firm, and endorsed them in its name. A, who discounted them, had no previous transactions with the firm. The evidence was conflicting as to the proceeds. A sued all, and C and D made defence. Court charged for defendants, because form of commercial paper was notice to A of an individual transaction.—Reversed. The appointment of B as a liquidating partner made his individual name ambiguous, and if used for the firm and proceeds of notes went in liquidation, C and D were bound. Court could not take the question away from the jury. Lloyd v. Thomas, 29 Smith 68, Pa. (1875).

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§ 185.

If no liquidating partner is appointed, any partner who continues the business can bind his co-partners for a liquidation.

As the partners could prevent any co-partner from continuing the business except by their authority or appointment, his acting will bind them.[1] In Pennsylvania, giving commercial paper is an incident to the liquidation.[2]

1. *When no liquidating partner appointed, either partner may act.* A & B, partners. After dissolution B compromised firm claim against C. A & B sued C. Defence: Compromise and release. Reply: B's authority ceased with dissolution.—Judgment for C. There being no liquidating partner, either might act. Hawn v. Land & Water Co., 16 P. Rep'r 196, Col. (1887).

2. *Unless partners prevent co-partner from acting as liquidating partner, they will be bound by him, although they did not appoint him.* B, C & D sold their works, ceased business and dissolved in the spring of 1873, without appointing a liquidating partner. D was also partner, managing director and member of discount committee in banking firm; A, which discounted two notes for D, made by and to him in B, C & D's name, and endorsed by him, and a third note, endorsed by D, in B, C & D's name; all made and discounted in 1875. A sued B and C.—Recovered. As the charge denied A's right to recover, unless D was liquidating partner, verdict settled that defendants knew D acted as such, and did not object. Fulton v. Central Bank of Pittsburgh, 11 Norris 112, Pa. (1879).

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§186.

The right to liquidate the business passes with the retiring partner's interest.

The appointment of the continuing partner is part of the security for his advance of the retiring partner's interest in the firm.[1]

1. *Right to liquidate by contract.* A advanced to B, retiring partner, his capital, and agreed to assume the debts, collect the credits and make a settlement. B, for value received, released C, a firm debtor, who had notice of the dissolution. A sued C, and he set up the release.—Recovered. B's assignment of interest until settlement, as security for advance and assumption of debts, carried his right of control. Gram v. Caldwell, 5 Cow. 489, N. Y. (1826).

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§187.

The power of settling up the business, if committed to a stranger, is revocable, as it is not coupled with an interest, while the power of a liquidating partner is irrevocable.

The distinction between making a partner and making a stranger the agent for liquidation, reveals itself in the release of a firm debtor. If made by a partner, it revokes, by implication, the agent's power;[1] but it does not affect the liquidating partner.[2] On the contrary, the release itself is void, because the co-partner usurps the prerogative of the liquidating partner, who is the firm, for a settlement of its affairs.[3]

1. *Stranger's right to liquidate revocable.* Upon dissolution partners appointed A, a stranger, by an irrevocable power of attorney, for liquidation. A sued a firm debtor, who set up a release by B. Debtor had notice when he took the release of the dissolution, and appointment of A.—No recovery. Authority, though in terms irrevocable, was revoked by release, because power not coupled with an interest. Napier v. McLeod, 9 Wend. 120, N. Y. (1832).

2. Gram v. Caldwell, *supra* § 186, n. 1.

3. *Appointment of liquidating partner irrevocable.* Upon dissolution, B was appointed liquidating partner. A, without cause of complaint, sought to resume control, or have a receiver appointed.—Bill dismissed, because appointment irrevocable. Hayes v. Heyer, 4 Sandf. Ch. 485, N. Y. (1847).

§188.

The liquidating partner is not entitled to compensation for his services.

He is a partner, and no partner is entitled to compensation for his services.[1] But he can employ a clerk, and pay him a salary for services.[2]

The surviving partner may recover compensation for carrying on the business for the deceased partner's estate; but this is no exception to the rule which prohibits compensation to the liquidating partner.[3] Continuing the business is not liquidation.

1. *Liquidating partner not entitled to compensation, and charged interest on collections mingled with his own funds.* A & B, carpenters,

erected buildings in partnership. Each agreed to devote his whole time and labor to the work, and pay his own expenses. On a settlement, A claimed interest on collections made by B, as liquidating partner, which he mingled with his own funds and used in his individual business. B demanded compensation for his services rendered before the partnership began and after it terminated. B had made contracts for buildings and worked on them, before forming the partnership with A.—A recovered interest, and B not allowed compensation. The work already done might have been an inducement for A to enter into partnership with B; and the firm continues, even after dissolution, until its affairs are wound up. Dunlap v. Watson, 124 Mass. 305 (1878).

Partners, if appointed receivers, are entitled to compensation only as such, although the articles stipulate for compensation to the partners for their services. Plaintiff's attorney in the settlement has no claim upon the joint fund for a fee. C & D, partners. Articles provided a percentage to each partner as compensation for his services. C left his share to two children, A and B, who acted for all of them. C's widow elected to take against his will, and this caused a dissolution. Court appointed A and D, receivers, at a salary to be fixed by the master. D demanded compensation according to the articles, in addition to his salary as receiver. A claimed a fee for his attorney in winding up the business.—Extra compensation to D disallowed, and A's attorney no claim. Lennig v. Lennig, 11 W. N. 18, Pa. (1881).

2. *Liquidating partner entitled to no commissions for services, but may pay clerk for his services.* A & B, upon dissolution, made B liquidating partner. A brought account, which was refused, and master refused a compensation, but allowed C $500 for services.—A entitled to 3 per cent. commission on collections, and C to nothing. Hutchinson v. Onderdonk, 2 Hal. Ch. 277, N. J. (1847). On appeal, C's claim of $500 allowed. Onderdonk v. Hutchinson, 2 Hal. Ch. 632 E. & A. (1849).

3. *Though compensation not allowed surviving partner for winding up business, he is entitled to be paid for continuing business for benefit of deceased partner's estate, and with his representative's concurrence.* The stock in trade of A & B consisted of patents for weapons, machinery for manufacturing, and government contracts to supply them. A died, and B continued the business, in order, with assent of A's administratrix, to fulfill existing contracts, and made new ones to work up the stock on hand. A's administratrix brought account, and B claimed compensation.—Allowed. Though B not entitled to compensation for winding up the business, he is for continuing it, if advantageous and with the concurrence of the deceased partner's representative. Schenkle v. Dana, 118 Mass. 237 (1875).

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§189.

The general creditor has a standing to control the liquidating partner.

The creditor, though without a judgment, has an interest in the administration of the assets, as they constitute a trust fund for the creditors.[1]

1. *Firm creditor without judgment may restrain liquidating partner from wasting assets.* B, after dissolution, ousted C from possession of firm stock. C asked for account and receiver, but afterwards withdrew his bill. A, who was a general, but not a judgment creditor of firm, sought to enjoin B from wasting the assets, and to have a receiver.—Decree. Firm assets a trust fund for creditors, and undisputed claim equivalent to judgment. Dillon v. Horn, 5 How. Pr. 35, N. Y. (1850).

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§190.

The liquidating partner will be displaced only by proof of the necessity for a receiver.

A partner will naturally have more interest in the administration of the business than a stranger would have, and by his services the expenses of a receiver are saved to the firm.[1]

1. *Liquidating partner not displaced without proof of necessity for a receiver.* A sold out to B & C, who continued the firm business. They agreed to pay his share, and let him have access to the books, and collect debts. A asked for an account and a receiver, because he had received no instalment of the price or account of the debts collected. His affidavit set forth that he required possession of the books, as evidence to prove his case, and that two policies on the lives of large debtors to the firm would be forfeited if premiums were not paid promptly. Counter affidavits of B & C: That sufficient debts had not been collected to pay outstanding claims, which had been met by B & C's advances; that A had access to the books, and had collected debts.—Refused. Defendants in possession under agreement with plaintiff, and no mismanagement or denial of access shown. Defendants had more interest to keep policies alive than a receiver would have. The expense of a receivership would be an extra burden. Hoffman v. Steinbeisser, 11 W. N. 383, C. P. No. 4, Pa. (1881).

CHAPTER VI.

MARSHALLING THE ASSETS.

§191.

What constitutes the relation, has been the riddle; but the stumbling-block of partnership is marshalling the assets. No principle being admitted which would settle the basis for distribution, the law could be nothing but a chaos. The rule which has finally been settled in cases of insolvency, is that the firm creditors take the firm assets equally, and the separate creditors take the separate assets. Each class is, of course, entitled to its share in any surplus arising from the fund of the other. The rule has its origin at law, but has received its greatest development in Equity.

The theories which have been suggested to account for the course of distribution in equity, do not go to the source of the change, and explain the cause which brought about the departure from the Common law system. The notion of credit, that as the joint creditors relied upon the firm assets, the separate creditors looked to the separate estate for payment, is an assumption. It contradicts the experience which imputes to every man a knowledge of the law. The credit would depend upon the estate which the debtor had. The partners have joint and separate estates, which are both subject to the firm debts. The credit would, of course, be given in reliance upon both estates. The partner has a resulting interest in the

firm after all its debts are paid, and his separate estate, which is also subject to the firm debts. His creditor could expect nothing from the partner's share, until the firm creditors had been satisfied, and he could only share the separate estate with them, unless insolvency supervened, which would give him a paramount title to the separate fund. The credit given to a debtor is not the cause of his estate, but a consequence of his possessing the means to pay the debt.

The Civil law is invoked to illustrate the credit theory according to which each fund is the inducement to the credit given to the debtor in his corresponding capacity. It is true that at the Civil law the creditors of a particular business had a prior claim to its fund, but this arose from the analogy to the law of sale in that system (§108). They obtained this priority not because they had given credit on the faith of the fund, but because the sums they had advanced, or the goods they had delivered, had passed into, or produced, the fund.

There were instances at the Civil law of credit given to a particular fund, as, for example, to the *peculium* the property of a slave, or of a son who was not *sui juris*. In these instances credit must necessarily have been given to the fund, and not to the individual, for the slave, or son, was incapable of incurring an obligation, except in respect of his *peculium*. Hence, no reliance can be placed upon this illustration, and the authorities, as might be expected, are explicit in making the distinction between them and the case of a debtor who is a freeman.[1] The credit theory will never be true in our law until, as in the case of the *peculium*, the debtor is relieved from all personal re-

sponsibility to the firm and separate creditors, except in respect of the different funds which they respectively claim.

1. Matthiae: „Controversen-Lexikon des Römischen Civilrechts," 171, where the authorities are collected. *Supra* § 108, n. 4.

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§192.

Firm creditors may reclaim payment made to the separate creditors from the firm assets.

Upon insolvency, the assets of a firm belong to its creditors.[1] Any appropriation of the property to a different purpose is a fraud upon them. If the partners devote the firm assets to the payment of their individual debts, they defraud the firm creditors. The separate creditor could not claim payment out of the firm assets,[2] nor can he retain firm property wrongfully diverted to the payment of his claim. The firm may compel the restitution of all that the separate creditor has received from the firm assets.[3]

1. *Surviving partner cannot prefer firm creditor.* Partner C died and B assigned whole stock and lease to D, to manage, sell, and apply proceeds to his claim against firm, and the choses in action to E in payment of his claim. Firm creditor A sued B, D & E, to set aside transfers as a fraud on creditors.—Judgment for A. B could not give preference of stock, because not sole owner, and law prevents C's executor or administrator from giving preference of choses in action, because though having the legal title and the sole right to sue, he is a trustee in equity for C's share. Loeschick v. Addison, 3 Rob. 331, N. Y. (1865).

If all the partners are living and unite in making a payment or giving security to a firm creditor, the act is good, although the firm is insolvent.[a]

a. *Partners, though insolvent, can prefer creditor, and secure him by chattel mortgage of firm stock.* B & C, partners, executed chattel mortgage on firm stock for $20 to A. Firm insolvent. Attachments issued against B & C. A sued D, sheriff, for seizing stock. Evi-

dence did not show extent of A's claim.—Judgment for A. Without proof that mortgage for private debt, or in excess of firm indebtedness, court cannot invalidate transaction. Rothell v. Grimes, 35 N. W. 392 (1887).

2. ***Firm creditor, who is a stranger, has priority over a partner-creditor, unless stranger relinquishes his privilege.*** **A & B kept a livery stable in partnership. C advanced them $5,000, to buy stock, and took their joint and several bond. A advanced $1,600 to the firm, and took B's bond. A and C agreed that proceeds of execution issued by either should be divided rateably. Both obtained judgment, and issued execution the same day, though A first. A claimed priority. —No right against C, except by his agreement. Linford v. Linford, 4 Dutch. 113, N. J. (1859).**

Blackwell v. Rankin, *supra*, § 106, n. 5, *c*.

The priority will be lost if judgment against firm assets is given in favor of a separate creditor and no objection be made by the partner in time.[a]

a. ***Firm creditor, especially if a subsequent creditor, cannot contest a judgment which gives firm assets to a separate creditor.*** **B, a creditor of D, attached C for his debt to firm D & E before a justice, who gave B judgment for half the debt. A, a subsequent creditor of D & E, attached C, who paid A the other half, but he claimed the whole.— Judgment for garnishee. Though justice's apportionment of firm asset illegal, E did not appeal. A could not attack the judgment collaterally, even if he had been a creditor at the date of B's attachment. Howard v. McLaughlin, 2 Outerbridge 440, Pa. (1881).**

3. Smith v. Loring, *supra*, § 126, n. 1.

Where firm is made liable on its note, given by partner for his debt, the firm's assignee in bankruptcy may prove for the amount against separate estate. **B drew a note in firm name of B & C, had it discounted, and used the money for a private purpose. B died and the firm became insolvent. A, firm's assignee in bankruptcy, offered to prove against B's separate estate for full amount of note. Master cut down claim to the amount of dividend anticipated from firm fund on account of the note. A excepted.—Report of master affirmed. Baker v. Dawbarn, 19 Grant's Ch. 113 (Up. Can.), (1872).**

If the withdrawal of firm assets for private use was made prior to insolvency and in good faith, restitution will not be enforced in bankruptcy.[a]

a. ***Open withdrawal of firm funds by partner not a fraud on firm.*** **B received the proceeds of a firm sale, and after entering same on firm books, in due form, transferred the item on the books to his individual account, without his co-partner's knowledge. Firm was solvent at the time. On insolvency, A, the assignee in bankruptcy of firm, offered to prove against B's separate estate for the amount withdrawn. —Disallowed. The withdrawal, though unauthorized, was not fraudulent, because open and not in expectation of insolvency. In re Hamilton, 1 Fed. Rep'r 800 (1880).**

§193.

Equity does not intervene to settle the basis of distribution, unless a conflict exists between the different classes of creditors to share in the division of the two funds.

If there is but a single fund, no conflict arises for a court of equity to adjust, and the Common law prevails, with its theory of a paramount claim in the firm creditors to the firm fund, and a co-ordinate right with the separate creditors if there be no firm fund. The theory enables the firm creditors, if there is nothing but partnership property, to take it all; but if there is no firm property, to participate in the distribution of the separate estate with the separate creditors.[1]

The right of the joint creditors against the separate estate subsists in chancery, in spite of the preference which equity gives to the separate creditors.[2] No thought is entertained of taking away the joint creditor's right to hold the separate estate for the satisfaction of his debt. On the contrary, the right is as well established in equity as at law. Unless the exertion of the right would interfere with the claims of the separate creditors, it would prevail, and take the estate.[3]

1. In re McEwen, *supra* § 105, n. 3.

A partner's discharge in bankruptcy bars a firm debt if no firm estate. B & C gave their firm note to A. B was adjudged a bankrupt on petition of his separate creditors. B filed a schedule of his debts, including the note to A, who had not claimed a dividend, but resisted the discharge on grounds not stated. A's objections were overruled, and B was discharged. There was no firm estate. A released C from his liability on the note for a payment of less than one-half, and sued B for one-half. Defence: A's claim was barred by the discharge.—Judgment for B. There being no firm estate, A might have proved against B's separate estate; hence, his claim is barred by the discharge. Curtis v. Woodward, 58 Wis. 499 (1883).

Firm creditors share in separate estate when there are no firm assets. B & C were insolvent. The firm estate amounted to $1.19, which

was subsequently absorbed in costs. C had no estate. B's estate amounted to $1,177.36. Claims proved against the firm amounted to $2,200; against B's estate to $1,133.67. The firm creditors offered to prove against B's estate.—Allowed. The rule for marshalling assets between the separate and firm creditors applies only when there are two funds. Harris v. Peabody, 73 Me. 262 (1881).

Firm creditors may share in estate of deceased partner when there is no firm fund. On death of B, A, who was a creditor of B & C, offered to prove against B's separate estate in the hands of his administrator. Neither the firm nor C had any assets.—Allowed. Higgins v. Rector, 47 Texas 361 (1877).

2. *Equity will not disturb the prior lien of a judgment against the firm upon separate real estate in favor of separate judgment-creditor.* D sued B & C for a firm debt. C died pending suit, and D recovered judgment against B. A obtained judgment against B for a separate debt, and on the ground that B's real estate could not pay both judgments, asked that D should be compelled to resort to the real estate of C, deceased.—Judgment for D. Securities are marshalled in equity, only where claims are against a common debtor; or, perhaps, where the co-debtor has a claim, for his own sake, that his associate pay the joint debt. Not the case with partners, even as to half the debt (as might be the rule between co-debtors), because the accounts are undetermined. Only equitable assets are marshalled in chancery. Equity never disregards a legal priority, and D's judgment against the firm is a prior lien on B's separate estate. Meech v. Allen, 17 N. Y. 300 (1858).

3. Randolph v. Daly, *supra* § 105, n. 2.

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§194.

The equity of the firm creditors rests upon the partners' recognized liability at law.

The personal liability of a partner for the firm debts is the foundation of his equity, which enables him to control the application of the firm assets for the relief of his separate estate. This equity is not a contractual right, but is an incident of the relation, and continues after the contract of partnership has been superceded by a dissolution of the firm. The equity of the firm creditors has been described as a derivative right, a mere application of the partners' equity.[1] But if the partner's equity is founded upon the partner-

ship contract, and the firm creditors' equity is a mere derivative right, then the firm creditor's equity is derived from the contract between the partners, a conclusion which cannot be admitted at law.[2] Both premises, however, are untrue. The partner's equity, as has been shown (§ 106), is not founded on contract, but on liability. The firm creditors' equity is not derivative through the partners, but is original, by virtue of the position given by the law to the joint fund as the primary debtor.[3]

The destination given by the partners to the stock which they contribute to the firm, and employ in the business, has been called the foundation of the firm creditors' equity. The statement is true as an abstraction. The destination is the ultimate cause of the privilege. The doctrine of destination, however, is an equitable principle of modern origin, and cannot consistently be made the basis of an ancient and acknowledged legal right. Unless the equity had a support at law, the legal rights of the separate creditors would override and destroy it (§ 107). The partners cannot by a contract withdraw property from their creditors. A contract does not bind anybody but the parties to it.

It is the Common law theory of estates, which enables the partners to segregate property and deal with it as a distinct mass, apart from the residue of their possessions. The traditional method is to create a joint estate, in analogy to the joint tenancy of land. It is by virtue of the joint estate that the partners trade in a distinct capacity.[5] Apart from the estate, the Common law does not permit a person to act in a single capacity (§ 108).

1. *Transfer by firm of its assets to partner bars creditors' equity, and partner's transfer for past debt a valuable consideration.* B & Co., indebted to A & Co., and to others, transferred all the firm stock and credits to B, who had advanced money to B & Co., and he agreed to pay its debts. B assigned most of the assets to C, his father, for a past debt. A & Co., who recovered judgment against B & Co., but obtained no satisfaction by execution, brought bill for payment out of assets in C's hands.—Dismissed. Creditors' equity lost with firm's equity, by transfer to B, and his assignment for past debt a valuable consideration. Wilcox v. Kellogg, 11 Ohio 394 (1842).

2. *Partner's equity not subject to execution.* E attached the stock of B, C & D as non-residents. Attachment set aside against D, because resident. Pending attachment, D, with consent of B & C, sold all firm property to A, and distributed proceeds among creditors of the firm, excluding E. Sheriff, F, took bond of indemnity from E, and sold the entire property attached. A sued E and F for conversion.—Recovered one-third of price. Attachment covered only interests of B & C, and sheriff could not sell their right, to have D's applied to payment of firm debts. Berry v. Kelley, 4 Rob. 106, N. Y. (1866).

Belknap v. Abbott, *supra* § 106, n. 3.

3. *Firm creditors' priority not lost where one partner takes the assets and assumes the debts.* B & C disagreed, and the arbitrators awarded the firm assets to B, who was to pay the firm debts. D, who was a separate creditor of B, levied on the funds, then A, who was a firm creditor, did the same. The sheriff paid the money to D, as the prior execution. A sued the sheriff for a misapplication.—Judgment for A. The firm creditors' legal and independent right was not destroyed by the award and consequent transfer to B. His right does not rest on any lien or equity of the partners between themselves. Tenney v. Johnson, 43 N. H. 144 (1864).

Sale of firm assets by partners to pay a separate debt passes no title against firm creditors, where buyer knows the purpose of the sale. B & C were indebted to D. B was indebted to E for his contribution to firm. B & C sold all the stock to A, and took a note, which was indorsed to E for payment of B's debt. A knew the purpose of the sale. Under writ of F, a firm creditor, G, the sheriff, levied on the goods in A's hands, and sold the same. A sued G for trespass.—Judgment for G. The sale was a fraud on firm creditors, who have an original and independent right to the firm fund. Ferson v. Monroe, 21 N. H. 462 (1850).

See another statement of this case, *supra* § 106, n. 1, *c*.

4. *Firm title good, though partner insolvent when he entered into partnership in his wife's name, and her title a fraud on creditors.* A, insolvent hotelkeeper, acted as his wife's agent, and did business with B, under firm of A & B, the wife being A. Bill by his creditors to take hotel property at Long Branch.—Not entitled. Real estate belonged to firm, though title in partners as tenants in common. Bulk of indebtedness contracted in improving premises. Mortgage by partners for individual debt good, if firm solvent. National Bank Metropolis v. Sprague, 5 C. E. Gr. 13, N. J. (1869).

5. *If sheriff takes a bailment receipt for surrender of firm goods, seized on separate execution, bailee is exonerated by showing nothing left for separate creditors.* A, the sheriff, seized goods of B & Co., on a separate execution against B, but surrendered them to C, upon his declaration in the receipt that they were free from encumbrances,

that he would keep them safely, return them to A on demand, and save him harmless. C returned them to B & Co., who were insolvent at the time, but did not go into bankruptcy until more than four months afterwards. They were discharged in bankruptcy. A sued C upon his receipt.—Judgment for C. The goods did not belong to B, and C was exonerated in surrendering them to B & Co. The receipt was not an indemnity which would estop C, but a bailment, and A had no right to take the goods, or to retain them. Lewis v. Webber, 116 Mass. 450 (1875).

§ 195.

Equity does not destroy, but controls, the firm creditor's rights against the separate estate.

The several liability of the partners is no less a constituent of the partnership obligation than is their joint liability. Both spring from the root of partnership.[1] The enforcement of the several liability to its legal extent might exclude the creditors of the individual partner from any share in the distribution. The joint creditors could exhaust the separate estate first. Equity interfered to prevent this result, and limited the joint creditors to the joint fund in the first instance (§ 108).[2]

The joint creditors retained, after the equitable repeal of their privilege to resort to both funds, an independent right to the firm assets, but they lost the right, which they had previously enjoyed in addition, to resort to the separate fund on equal terms with the individual creditors.[3] Before this rule was established they were allowed to come in upon the separate fund only upon condition that they surrendered an equivalent for what they had received from the joint estate.[4]

1. In re Webb, *supra* § 105, n. 2.

One who lends partners their entire capital is a firm creditor. B & C borrowed money to begin business of C's sister, A, and both signed the note. A subsequently lent them additional funds, and they executed notes and a mortgage for the entire loan. Firm creditors contested A's right to firm assets.—A entitled. If loan a joint act for firm, superadding partners' several liability does not change it. Carson v. Byers, 21 Reporter 232, Iowa, (1885).

2. Bardwell v. Perry, *supra* § 108, n. 6.

3. *After receiving a dividend from the firm assets, creditor of partners by a joint and several bond is excluded from their separate estates.* Joint commission issued against B & C, partners, and a separate commission against B. A obtained a dividend on his joint and several bond out of the joint estate, and then claimed against B's separate estate, with his individual creditors.—Disallowed. At law, creditor might proceed against each debtor's estate until satisfaction, but not in bankruptcy, because there distribution must be equal. Ex parte Bond, 1 Atk. 98 (1745).

4. Bell v. Newman, *supra* § 105, n. 1.

Firm creditors may not share in separate estate until separate creditors have received a dividend equal to that received from firm assets. B, C & D gave their note with the separate endorsements of B & C to A. The firm and all the partners became insolvent. A obtained a dividend of 31 per cent. from firm estate, and proved for remainder against the separate estate of B, and claimed a dividend. This fund would not pay B's separate creditors more than 30 per cent.—Disallowed. The separate creditors of B must first receive 31 per cent., and then A may come in on an equal footing with them. B's individual endorsement on the firm note gives A no standing as a separate creditor after electing to treat themselves as firm creditors, in taking a dividend from firm fund. Fayette Nat. Bank of Lexington v. Kenney, 49 Ky. 133 (1880).

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§196.

Equity does not restrict the firm creditors, except when they have a joint fund.

The restriction was heralded as the establishment of a principle which remanded each class of creditors to its distinctive fund.

There is no such principle. The rule of convenience (§ 105), which was adopted in bankruptcy proceedings, does, in effect, limit each class of creditors

to its particular fund, when there are two funds to be apportioned between them (§ 108), but the rule does not come into operation until the firm creditors possess a joint fund. The right of the firm creditors is general against all the property of the partners, and the claim, even in bankruptcy, corresponds to the right.[1] The exertion of the right is controlled only when, and because, it would deprive the separate creditors of any fund.[2]

1. The several liability exists as a constituent of a joint debt, and, therefore, proof is allowed by a joint creditor against the separate partner, though no participation is permitted until the separate creditors are satisfied. In re Webb, *supra* § 105, n. 2.

2. *Firm's assignee in bankruptcy cannot prove against separate estate for partner's debt to firm, if no fraud, where separate creditors will not be paid in full.* B & C were declared bankrupts on their own petition, and B on petition of his separate creditors. A, assignee for firm, offered to prove against B's separate estate for B's debt to firm. There was no proof of fraudulent misapplication of firm funds by partner, and there had been no settlement of account between the partners. B's separate estate would not pay his separate creditors in full.—Proof disallowed; because debt not fraudulent and separate assets insufficient to pay separate creditors. In re Lloyd, 22 Fed. Rep. 90 (1884).

§ 197.

The restriction protects nothing but the separate estate.

The bankruptcy rule which has adopted this equitable restriction, says the separate partner is not liable for firm debts out of his separate estate until the separate debts are paid.[1] Does that mean: No firm creditor's claim shall compete with a separate creditor's claim? If a partner's debt to his firm is a firm asset, then the firm creditor could take it without competing, because

the debt, not being part of the separate estate, would not belong to the separate creditor.[2] Does the separate debt of a partner to his co-partner come within the prohibition? It seems not. The liability of each partner exists for the firm debts. Any shifting of the separate assets from one partner to another after insolvency, is an interference with the firm creditors' rights.[3] But the change can prejudice them only when but for this payment there would have been a surplus, over and above the separate debts in the estate of the debtor partner. If the plaintiff partner recovers as a separate creditor of his co-partner, and the debtor partner has not more than enough to pay his own separate creditors, the firm creditors are not damnified, and might be benefited. For if the plaintiff had no separate creditors, the increase of his separate estate would then give the firm creditors an additional fund for the payment of their debts. If he had separate creditors, they might be paid, and a surplus created, by means of the separate credit thus collected. There is no difficulty in a firm creditor getting the surplus, after the separate creditors are paid, without availing himself of the rule of convenience.

1. *Between firm creditor and separate creditor, both subsequent to a joint creditor with mortgages against joint and separate estate, equity will marshal the separate assets in favor of the separate creditor. Payment by the firm creditor of the joint creditor's claim, prevents enforcement of his mortgage against the separate estate.* B & C mortgaged firm property, and B mortgaged his separate estate to D, for a loan made by him to the firm. B made a second mortgage of his individual property to his separate creditor, E. E attached C's interest in the firm property for a separate claim against him. B conveyed his moiety of the firm property to C. A issued attachment against B & C for a firm debt, obtained service on B, and judgment against him. E obtained judgment in his attachment, and levied upon C's undivided interest. E bought D's claim, took an assignment of his mortgages, and brought bill to foreclose. A levied under his attachment upon the firm property not covered by E's attachment. A paid amount due E by decree in foreclosure of firm mortgage, and brought bill to be subrogated to D's rights as mortgagee

against the firm property, and against the separate estate of B. The firm's equity of redemption possessed no value to satisfy A's attachment, unless D's claim was apportioned between the mortgages and a part collected from B's separate estate.—Dismissed. Firm mortgage principal, and B's mortgage surety for D's claim. Equity would not enforce payment of B's first mortgage until the firm property was exhausted, and enable A to collect his attachment debt out of the firm assets in opposition to B's second mortgagee, E, who claimed that B's separate estate should be reserved for his separate debts. But A's payment of D's claim to his assignee, E, extinguished the debt, and if A were subrogated to D's rights, he could not enforce B's first mortgage, since it was merely surety for D's debt, which was extinguished. National Bank v. Cushing, 53 Vt. 321 (1881).

Joint and several creditor, by bond of partners, may elect in bankruptcy the firm or the separate estate. B & C, partners, were liable on a joint and several bond to A, who issued a joint commission against them in bankruptcy.—He could not issue a separate commission, as he was bound by his election. Ex parte Banks, 1 Atk. 106 (1740).

2. *Firm creditors may follow firm assets mortgaged by partner for his separate debt.* B & C dissolved, and B took the assets and agreed to pay debts. B exchanged the assets for a tract of land, taking title in his wife's name, and subsequently mortgaging the tract for protection of his separate creditor, D, who had notice. Firm creditor, A, brought bill to subject the land to payment of firm debts.—Decree. B's course a fraud on firm creditors. Renfrow v. Pearce, 68 Ill. 125 (1878).

Firm creditors may prove against estate of partner who has fraudulently overdrawn his account. B was manager for B & C. He drew out £600,000 for his own purposes, and concealed the fact by false entries. A, and other firm creditors, offered to prove in bankruptcy against B's separate estate, for this overdraft.—Allowed, on the ground of the fraud. Read v. Bailey, L. R. 3 App. Cas. 94 (1877).

3. For this reason separate creditors can not compete with the firm creditors in the distribution of the firm fund.

Separate creditors can not prove against firm assets for partner's loan to firm. Separate creditor of B offered to prove against assets of B & C for amount of a loan from B to firm. B's estate insufficient to pay his creditors in full.—Disallowed, because no fraudulent transfer of assets after insolvency. Rogers v. Meranda, 7 O. St. 179 (1857).

§198.

A partner's claim against his co-partner, though independent of the firm, can not be enforced by separate creditors of creditor partner while firm debts are unpaid.

The separate estate is not recognized as having any right, except what the rule of convenience or of bankruptcy gives it. If the separate estate belongs to its creditors, certainly a debt from the co-partners is an individual asset, and should be included in the separate estate. If the separate estate had an independent right of its own, the claim could not be ignored, and would be enforced. But the claim is met by a firm creditor's claim, also, against the co-partners, which competes for their separate estate. Though the partner's creditors have a preference over the firm creditors upon his separate estate, the firm creditors have a priority upon the separate estate of his co-partners. The rule does not exonerate anything from the immediate liability for the firm debts, but the debtor's own estate. If he took part of his co-debtor's estate, he would have a preference over the firm creditors upon another's estate. This the rule does not give him.[1] It makes no difference that he is a separate creditor of his co-debtor. The firm creditor holds him as a debtor, and excludes him as a claimant from any fund, except his separate estate, which the rule exempts in the first instance, by a demand for satisfaction. If he does not pay the firm debt, he cannot cut out the firm creditor by taking the funds of a co-debtor, who would pay the debt. He shall not be a dog in the manger. The reason why he cannot collect his debt for his separate creditors, to the prejudice of the firm creditors, is that he owes it himself, out of his separate estate. The reason for the prohibition ceases when the separate estates of both partners are insolvent; then the firm creditor does not compete with either class of separate creditors, and has no right or interest

to prevent the shifting of separate assets from the estate of one partner to that of another.[2]

1. Although separate creditors may not enforce their claims against the estate of a co-partner in competition with the firm creditors for an indebtedness prior to insolvency, they may recover from the firm estate any amount drawn by the firm creditors from their own separate fund, in contravention of the rule of convenience.[a]

a. *Separate creditors have a lien on joint estate for amount diverted from separate estate after insolvency, to pay joint creditors.* Firm creditors of B & C elected to be separate creditors of dormant partner B, and took so much from separate estate of B that there was a surplus on joint estate. A, creditor of B, claimed a lien on that surplus to extent of separate estate of B taken for joint debts. Creditors of C demanded an equal division.—Decree for A. Ex parte Reid, 2 Rose 84 (1814).

2. *Partner may prove against separate estate of co-partner if no firm creditors.* C, fraudulently, gave notes in firm name of A, B & C, for his private use, and, without authority, A and B paid the notes in hands of *bona fide* purchaser, and all other firm debts, and then offered to prove against C's estate in bankruptcy for the amount of the notes.—Allowed, because no competition with firm creditors. Ex parte Young, 2 Rose 40 (1814).

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§199.

If there would be no surplus for the firm creditors out of the co-partner's separate estate, the partner might recover on a contract independent of the firm.

The several liability of each partner is a firm asset. Hence, no partner can sue his co-partner and withdraw part of the firm's resources. He would compete with his own creditors and take away their fund. But if there would be no surplus after the separate creditors were paid, the partner would be merely a separate creditor of his co-partner, and, like the sepa-

rate creditors, would be entitled to the co-partner's separate estate.[1]

If a partner has a separate claim, which he can enforce against his co-partner, can the joint creditors attach, or be subrogated to the right? If he collected the debt, it could be seized by them to satisfy their debt, and on an execution, any right, however remote or contingent, may be sold. The debt, when collected, is not exempted from execution by the joint creditors. The money belongs to the partner as his property, and is subject to all claims against him. His separate creditors alone are entitled to dispute the joint creditors' right, and if they do not exist, or intervene, no reason prevents the joint creditors from seizing the money.

1. Two partners become bankrupt. One is indebted to the other on a contract, independent of firm. He may prove against the separate estate of the other, if it is clear that there will be no surplus of his separate estate for firm creditors. The liability of a partner prevents his proceeding against his co-debtor and exhausting him while the creditors of both are unsatisfied. Ex. p. Topping 4 D. J. & S. 551 (1865).

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§ 200.

Where one partner has bought out his co-partner, the firm creditors may, by substitution, become his separate creditors upon the agreement of purchase.

A sells out to B, who gives his bond for the price and covenants to pay the firm debts. B fails, and A assigns his separate estate to pay the firm debts. The assignee cannot sue on the bond, unless the firm cred-

itors give up the joint estate. The assignee represents the joint creditors. They cannot come on the separate estate of B. They are entitled to the firm assets in the first instance, but they cannot have both the firm assets and the price. The firm creditors are excluded from the separate estate, unless they are converted into separate creditors by accepting the assignment of A, as a substitute for, or in satisfaction of the firm liability. They might make such a novation, and then they would be separate creditors of B upon the contract of purchase, and might, like any other separate creditors, come in on the separate estate of the purchaser, B, whose indemnity and obligation to pay the price are part of A's separate estate.[1] The creditors could not elect to be separate creditors, and not joint. It is not a matter of election; but the assignment might be accepted as a substitute, and in the assignment was the claim against B. The subrogation is to this separate claim of A against B and his separate estate.

The firm creditors can enforce by subrogation the covenant of indemnity in addition to the obligation to pay the price.[2] In the covenant of indemnity is B's original liability to pay the firm debts in another form, but the change of form corresponds to a change in substance. B's obligation to pay the firm debts has become his separate liability to A, which the firm creditors may enforce by virtue of their substitution to A's rights. Take a case for illustration: The firm liabilities amount to $50,000, the firm assets to $5,000. The price for which B gives with covenant of indemnity is $10,000. The amount of A's separate property, exclusive of his claim on the fund, is $10,000, making

a nominal total of $20,000 as the amount of his separate estate, which he assigned to the firm creditors. B's separate debts amount to $20,000. His separate assets amount to $25,000. As the firm creditors have adopted the contract between A & B, the firm fund of $5,000 becomes a part of B's separate estate and must be added, making a total of $30,000. All claimants are now separate creditors of B, and the claims against his estate are as follows: 1, His original separate creditors, $20,000. 2, The claims of A, which are now enforced by the firm creditors, and are classified under two heads: *a*, $10,000, the price of A's interest in the firm. *b*, His claim for indemnity, $20,000, making a total indebtedness of $50,000, which would give a dividend of 60 per cent. to both sets of separate creditors, giving to B's original separate creditors $12,000, and to the firm creditors, $18,000. The dividend to the firm creditors is in addition to the $10,000 cash which they received under A's assignment, and makes a total dividend upon their special claim of $28,000, or 56 per cent. The firm creditors have not proved for the full amount of the firm against the estate of B, but only for the amount of A's claim against B. If they had claimed the firm fund and repudiated the contract between A & B, they would have been excluded from B's separate estate, and have received but $15,000.

1. *Transfer by the firm of its assets to partner, bars creditors' equity, and partner's transfer for past debt a valuable consideration.* B & Co., indebted to A & Co., and to others, transferred all the firm stock and credits to B, who had advanced money to B & Co., and he agreed to pay its debts. B assigned most of the assets to C, his father, for a past debt. A & Co., who recovered judgment against B & Co., but obtained no satisfaction by execution, brought bill for payment out of assets in C's hands.—Dismissed. Creditor's equity lost with firm's

equity, by transfer to B, and his assignment for past debt a valuable consideration. Wilcox v. Kellogg, 11 Ohio 394 (1842).
Buffalo City Bank v. Howard, *supra* §69, n. 19.

2. *Where a continuing partner assumes the debts, his assignee for creditors must apply the assets to the discharge of the firm liabilities in preference to the separate claims against the continuing partner.* A was B's son and agent. He lent B's money in his own name to firm C, D & E. D and E sold out to C, who agreed to pay the firm debts. A, with knowledge of the arrangement, took C's note, and also lent C other moneys of his own. C made payments on account. He assigned to F, for creditors. The deed made no discrimination between the debts of C and the debts of the firm, but made certain preferred debts, including the note and A's private advances to C. In consideration of F's assigning to A, and of C's satisfying the general creditors, A re-established C in business, and bought up all the preferred claims. A assigned to D, as security, an undivided interest in the claim thus consolidated against C. D & E were also included among the preferred creditors. A purchased their claim, and in consideration of a discount, released them from all the firm debts. B was unknown, and A was considered principal in all these transactions. B applied the assets to payment in full, of all his expenditures in the purchase of claims under agreement, and applied C's partial payments in discharge, not of the note, but of his total loan prior to C's failure. A sued D & E, as B's executor, on her claim. Defence: D and E, by the sale to C, became sureties to the fund which A was bound to apply in discharge of their liabilities. The release by A included D and E's debt to B.—Judgment for D and E. C's partial payments should have been applied to the earliest of the claims which A represented, thus reducing the note. A, as holder of the fund, was bound to apply it in discharge of debts for which D and E remained liable in preference to A's original or purchased claims against C alone. Chapman v. Thomas, 4 Keyes 210, N. Y. (1868).

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§201.

Partners can not compete with firm creditors in enforcing claims between themselves; but may compete with other separate creditors.

The equity of a partner, on a balance of account, to be reimbursed his over-advances to a co-partner is not an independent claim, and, as against firm creditors, gives the creditor partner no standing as a separate creditor.[1] He could rank as a separate creditor only when all the firm debts were paid. Until they were

satisfied, he would have no equity or claim against his debtor co-partner. The right of the partner comes into existence only upon the satisfaction of all the firm creditors; it springs out of their ashes.[2] But when the firm creditors are satisfied, then the partner has a lien upon the firm fund for his advances, and may enforce his right against the separate creditors of the co-partner.[3] If the firm fund will not satisfy the partners' claim, they may prove against the separate estate of their co-partner.[4]

1. *Partner cannot prove against co-partner's separate estate for over-advances until firm creditors are paid.* B & C, partners, failed, and A was made assignee in bankruptcy for firm and separate estates. B had advanced to the firm $20,000 in excess of C's contributions. C's separate estate was sufficient to pay his creditors in full. The firm estate would pay 40 cents on the dollar. Thereupon A asked permission to prove against C's separate estate for the amount of this claim, on an equal footing with the separate creditors, and to distribute the dividend thus obtained among the joint creditors.—Disallowed. B could not be a creditor on firm account until all firm creditors were paid. In re McLean, 15 Nat. B'kr'cy Reg. 341 (1876).

2. *Partner who has paid all firm creditors may prove against co-partner's separate estate.* B having paid all the debts of B & C, offered to prove for balance of partnership accounts against C's estate, in competition with separate creditors.—Proof allowed. Ex parte Taylor, 2 Rose 175 (1814).

But there is no rule of law which prevents the wife of a partner competing with other firm creditors, if the firm is indebted to her separate estate.

Wife may compete with husband's firm creditors. A advanced £500 from her separate estate to her husband, B. Firm B & C used and gave promissory notes for it. A proved against firm.—Allowed. Statute 45 & 46 Vict., c. 75, s. 3, which excluded wife's proof, if loan to husband for trade, or business carried on by him, or otherwise, did not apply, if husband used the money as a partner. In re Neff, 19 Q. B. D. 88 (1887).

3. *Security to a partner for firm debt not a fraud on subsequent individual creditors.* B contracted to build a culvert, but couldn't raise the money. He applied to C, who refused a chattel mortgage as security, but went into partnership, contributing cash against B's implements and tools, which he promised to mortgage as additional security to C. B misappropriated C's contribution, and C, being unable to obtain security, abandoned the contract. B then undertook the work alone. A obtained judgment, and attached B's commission under the contract, and also brought bill to avoid assignment by B to C.—Dismissed. B indebted to A on firm account. Stamets v. Quinn, 11 C. E. Gr. 383, N. J. (1876).

4. *Partners have a lien on firm fund for the balance due on settlement, and are also separate creditors of debtor partner for the amount.* A, B & C, partners. On settlement of the accounts, C was indebted to A and B. C, who had possession of all partnership funds, became bankrupt on petition of his separate creditors. An order was made to keep separate estate of C distinct from estate of A, B & C. The firm fund yielded a surplus, which A and B claimed.—Decree for A and B, and if the surplus does not discharge C's balance of indebtedness, A and B may prove against his separate estate. Ex parte Terrell, Buck 345 (1819).

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§ 202.

The debt of a partner to the firm is not an asset of the firm.

What are the assets? The answer varies according to the different conceptions which prevail of partnership. In the commercial aspect the firm is a distinct person, who exists apart from the members composing the union. The accounts are kept with the firm, which deals as a person with the partners. All debts are charged up on the firm books, and the separate accounts of the partners show the balance which would be collected upon a settlement by the partner in whose favor the account stood. The commercial method of liquidation is the simplest, but it ignores the law which governs the relation. The person by whom a settlement of the accounts is effected is a myth of trade, and does not exist at law. The accounts vanish in the presence of a court, with the personality in which they centred. A partner cannot, at law, contract an indebtedness to his firm, for part of the debt would be due to himself and the balance would be due to his co-partners. The claim of the firm is resolved into separate claims of the partners, which are subject to the paramount rights of creditors.

The Scotch plan lets the firm collect a debt due it by a partner, subject to a set-off of his share of the claim, but does not let a partner collect a debt due him by the firm.[1]

Why is the right all on one side? and why have the partners no right against the firm? The explanation of the anomaly lies in the several liability of the partners. Liable to the extent of their individual resources for the debts of the firm, they can recover nothing from it, and must contribute to pay its debts. This is the legal theory of partnership. The partner who seeks to collect his debt from the firm is met by the joint creditors' right to collect their debts out of his separate estate. The debt which he reclaims for his separate estate is in their possession. He cannot take the fund away from them, and it will be appropriated according to their legal right. The right and possession coincide. He has an equal right, but the title is vested in them.[2]

If the amount which a partner owes a firm may be collected by it, in order to marshal its assets, the right of set-off by him of a co-partner's debt does not affect the firm creditors. They are paramount claimants, and override the domestic claims of the partners between themselves. The right of the firm to collect a debt from a member, if once recognized, establishes the firm creditor's right, and he may disregard the set-offs between the partners, and collect the full indebtedness from each partner, though the firm itself is entitled only to the balance after deducting the counter-claim. The asset is firm property, and not separate estate, however much the prospect of realizing separate estate out of the partner's interest, is dimin-

ished by excluding a set-off. The interest of a partner is his share after all firm debts are paid. He could not acquire separate estate by virtue of his interest while any firm debt remained unpaid. The partner's equity does not refer to an adjustment of accounts by the members, but applies to a diversion, by either partner, of firm assets. The members can restrain the misapplication of joint funds to any purpose which is foreign to the firm business. But the joint creditor needs no equity to resort to firm assets, as they constitute the normal funds to satisfy his debt. He may even exhaust the partners' separate estates, and it is only the independent right of a separate creditor which can prevent his recourse to them. It is only separate assets, which have not come into the firm, that the separate creditor can claim. As to property belonging to the firm, the separate creditor has no standing, either to claim or interfere with it.

Take an illustration: A & B are succeeded by B & C upon A's death. A was indebted to A & B $12,000; B was indebted to A & B $36,000. B & C reclaimed money lent to A & B. If the claimants sought to treat A's debt of $12,000 as an asset of his firm, could it enforce its collection until B had paid his debt of $36,000? Could not A's representative set off this debt against $12,000 of B's debt, and claim that A owed his firm nothing? If the common membership of B in both firms would prevent any recovery against his separate estate, the answer is, that, under McCormick's Appeal, what he owes his firm is joint, or partnership, assets, and not his separate estate. It is not the balance after deducting what A owes the firm ($12,000), that is $24,000, but both debts of the

partners, or $48,000, which is the firm asset. If B's debt could not be collected, then A's debt, which involves the same adjustment of accounts, could not be collected by the firm to repay its debt. Although McCormick's Appeal makes the debt of each partner to his firm partnership assets, yet that notion conflicts with the refusal of the courts to settle the partnership accounts in suits between firms with a common member. The Scotch plan is inconsistent with the exclusion of the separate estate, which was based upon the impossibility of settling the partners' accounts without a dissolution of the firm.

1. McCormick's Appeal, *supra* § 106, n. 7, *a*.

This was originally the English plan, but was abandoned, without any explanation, probably, as most changes in the law occur, by the unconsciousness of the judge who decided the point, of the previous course of decision. Lord BLACKBURN: Read v. Bailey, *supra* § 197, n. 2.

2. *Separate creditors can not prove against firm fund for over advances by their debtor partner to the firm.* B & C were indebted to B in the sum of $17,000. Firm assigned to D for benefit of creditors; likewise B and C each made separate assignments to D. A, and other separate creditors of B, claimed a right to prove against the firm estate for the debt to B.—Disallowed, because B could not compete with firm creditors, and his separate creditors could have no higher right. The privilege extended to firms with a common member does not apply to an individual partner. Houseal's Appeal, 9 Wr. 484, Pa. (1863).

§203.

If the surviving partner was indebted to his firm, the creditors would not be prevented by this indebtedness from collecting their debts out of the deceased partner's estate.

They ignore the state of accounts between the partners, and come in upon either partner's estate by a

title paramount, which cuts out any mere partnership or domestic claims. Take the facts of Laughlin v. Lorenz (§71, n. 2): The surviving partner was also a member of the succeeding firm, which, at request, paid the prior firm's debts, and was subrogated to the place of the creditors whom it paid. The surviving partner being a common member of both firms, nothing but the first firm's assets could be taken to satisfy the debts, if the second firm claimed payment. But the creditors were, practically, the claimants, and they are not limited to the firm assets, but may exhaust the separate estates. The surviving partner's debt to the first firm was an asset of that firm, which it alone could collect. The surviving partner, who represented the firm, did not pay, or make himself pay it, and his executors did not pay it either. The executors of the first deceased partner might probably have an account against them, and enforce the payment, but no one else could. If the suit had been by the second firm, no recourse could have been had to this asset, because it depends upon the domestic account of the original firm. A final settlement was necessary to ascertain the amount due. Nor could the deceased partner's estate have been compelled to pay the debt, for the decedent's estate was not less separate than the debt due to the firm by the surviving partner. This difficulty was overcome by subrogation, which put the second firm in the shoes of the creditors whom it paid, and gave it direct recourse to the separate estates of the partners.

§204.

The exemption at law of a deceased partner's estate would not entitle his representative to recover his share from the surviving partner in competition with creditors.

To put a case: When a partner died, his separate estate was formerly exempt, at law, from liability for firm debts. Could his executor recover on a contract that on the death of a partner his share should be paid him? No; the deceased partner's estate is liable in equity, and while it continues liable no recovery can be had against his co-partners. The liability for firm debts estops him from taking away, or diminishing, the joint fund devoted to their payment. The creditors have the deceased partner's estate, in addition to the joint fund, but their priority is limited to the firm assets. They are deprived of a preference by the amount which the separate partner's estate gets.[1] How if the recovery is obtained out of the other partner's separate estate? Then his separate creditors are deprived, to that extent, of their priority. The deceased partner's share is a right limited to the joint assets. If they were, at his death, worth $15,000, he would, as one of them, be entitled to $5,000. Would he be anything but a deferred joint creditor? After all the joint creditors were paid, he would be entitled to recover, out of the surplus joint assets, his share.[2] Suppose there were no joint assets left; could he proceed against the separate partner's estate? Not on the ground that the absence of joint assets entitles a joint creditor to come in on equal terms with the separate creditors on the separate estates, because there was a joint estate, though it had

been exhausted in paying the other joint creditors. Perhaps the payment of those firm debts before bankruptcy supervened might be considered as leaving no joint funds, and, therefore, letting the deceased partner's estate come in on the separate estates of his copartners with their separate creditors. If the deceased partner's share was what he was entitled to at the time of his death, then that amount was due from his co-partners, and if by their mismanagement the firm funds were wasted, they ought to make it up, individually, and they would be liable to pay out of their separate estate. The deceased partner would thus be a separate creditor, and entitled to come in with separate creditors. If the share were estimated in advance and valued at, say, $5,000, then if at the partner's death there was nothing after the debts were paid, the co-partners would, nevertheless, be liable in their separate estates, because they guaranteed that amount, and, consequently, were liable for it, and if there was no joint estate out of which they could pay the amount they must make it up out of their separate estates. The bankruptcy rule, being a creature of statute, is superceded by the enactment of any lien inconsistent with it.[3]

1. *Agreement between partners is subordinate to firm creditors' claim.* B, C & D, partners, agreed that on death of one his share should be paid his estate in instalments. B died, but before payment co-partners became bankrupt. A, executor of B, offered to prove against firm fund.—Disallowed. The separate assets in hand may be kept from the firm creditors, but no claims against the firm or a co-partner can be enforced. The liability of a partner for the firm debts continues, although his separate estate is exonerated in the first instance. Nanson v. Gordan, L. R. 1 App. Cas. 195 (1876).

2. *Retiring partner may prove for price of his interest, in competition with new firm's creditors.* B, C & D, partners, agreed, by articles, that on B's death a part of his capital should remain in the business, and be secured by bond of surviving partners, to B's executor. After B's death, C and D executed a bond to A, executor of B, to secure the

said sum, and A executed to C and D an assignment of all B's interest, on condition that they should assume and pay the joint debts. C & D paid all the joint debts of B, C & D, and became bankrupt. A offered to prove against the firm estates of C & D. The joint creditors of C & D resisted.—Decree for A, who was entitled to a dividend *pari passu* with the other creditors of C & D. Ex parte Edmonds, 4 D. F. & J. 488 (1862).

3. *The United States, when a firm creditor, may demand payment out of partners' separate estates, without resorting to firm fund.* B, C, D, E, F, G and H, residents of the United States, composed the firm of B & Co., and, together with I, J and K, residents of England, composed the firm B, I & Co. The latter firm owed the United States £132,610. B & Co. were adjudged bankrupts, and L was made assignee of the firm and separate estates. The United States, without first proving its claim, filed a bill against L and the members of B & Co., to subject the separate estates of the seven partners to the payment of its claim as a preferred debt. The bill did not aver that B, I & Co. were insolvent; the answer averred that such was not the case, and, furthermore, that the United States was amply secured by collateral.—Decree for the United States. The government has no claim on the joint fund of B & Co., but may enforce its priority against the separate estates of the resident partners, who, being principal debtors upon the liability of B, I & Co., can not require the United States to resort to its collateral, or to the solvent estates of non-resident partners. United States v. Lewis, 13 Nat. B'kr'tcy Reg. 33 (1876).

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§205.

A common member furnishes no basis for marshalling the assets of different firms.

At Common law, when two firms with a common member became liable for the same debt upon independent contracts, for example, as drawers and acceptors of commercial paper, or as principals and guarantors, the creditor has a separate action against each firm, and might have judgments successively against both, notwithstanding the fact that by this procedure judgment was actually entered twice against the common member for the same debt.[1] The reason of this rule is founded on the notion of a joint contract, which was regarded as something impersonal

distinct from the individual promises of the co-debtors (§ 91). The promise of the common member, together with his co-partners in one firm, was the basis of an independent obligation, distinct from his promise to pay the same debt made in conjunction with his co-partners in the other firm. Although by this means two judgments might be obtained against the common member for the same debt, and execution might issue against the property of both firms, or either of them, there could be but one satisfaction. The same rule applied where there was a promise by a firm, and the additional and subsidiary promise by one, or more, individual members of the firm, or *vice versa*.

The question arose in bankruptcy, in the form of an attempt to make double proof. Although double proof was allowed in conformity to the creditor's legal status, equity controlled the exercise of the legal right, and compelled the creditor to elect, and gave him a dividend only out of a single fund.[2] This is but a different application of the rule of marshalling assets between the joint and separate creditors of a firm. The only difference is in the matter of election. The joint creditor, who is nothing else, has no election, and is confined to the firm fund, although the individual partner is ultimately liable in his separate estate for the joint debt. But in the case under discussion the joint creditor, in addition to the firm obligation, has a formal independent promise of the partner, either alone or in conjunction with a third person.

Yet the common partner was the controlling factor in the reasoning by which Courts of Equity arrived at the doctrine of election. If double proof were ad-

mitted, Equity, it was supposed, could not disregard the fact that the creditor held two funds of the same debtor as security for his claim, and that there were different sets of creditors respectively claiming these funds. Equity, therefore, it was thought, would be compelled to marshal both funds with respect to this common claim. If this were not done, it would be impossible to ascertain the equitable portion which each fund should contribute to pay the common claim, and the common creditor might, by proving against both funds, have his claim paid in full, while the creditors of the different funds received only a dividend, although creditors of the common partner equally with himself. This marshalling of the assets was impossible, because the creditors of the different funds stood upon no common basis. An equitable division of the common creditor's claim between the two funds was impossible without a uniform rate of dividend, and a uniform rate was impossible, because there was no single fund to distribute among all the creditors.

When courts of Equity found that there could be no marshalling of the two funds, with respect to the common claim, they compelled the common creditor to elect which fund he would pursue.[3] The election was not the consequence of any equitable principle. It was an arbitrary rule, which deprived the common creditor of his legal right. The creditor of one fund was enriched at his expense, without any corresponding relief to the creditor of the other fund.

The Bankrupt Acts of England[4] and of the United States[5] have changed the practice, by giving prominence to the presence of the other partner, who is not

a common debtor. These statutes allow double proof in the cases under discussion. The statutes do not apply where the double obligation is purely nominal, that is to say, where the same persons are trading under different firm names, and although the contract seems to express the promise of two distinct firms, it is, in reality, nothing but the double promise of the same individuals.[6]

At the present day, in America it is unnecessary to recur to the notion of a joint contract in order to make available the creditor's right against the funds of both firms in an action at law. He might get judgment against the partners in one firm, and then bring an action against those partners of the second firm whom he had not sued as members of the first firm. His judgment against them would enable him to take the assets of the second firm in execution.

1. "At Common Law, where no bankruptcy intervened, "if a man had a claim for £100 arising out of a contract "in which two firms or two sets of persons were con-"cerned, one individual being common to both firms, "as, for instance, if a firm consisting of A & B drew "on a firm consisting of B & C, there is no doubt what-"ever that the man would have had his action against "A & B as drawers, to recover his £100, and his action "against B & C as acceptors; and if he recovered judg-"ment upon either one or other of those, he could have "levied his execution against the estates of both the "contracting parties, and the fact that one of the con-"tracting parties who had contracted, say as acceptor "of the bill, was also a person who had contracted as "drawer for the same sum of money, would have had "no effect upon his right to issue execution against the "estate and property of the firm B & C, who had ac-"cepted the bill." Lord BLACKBURN, Read v. Bailey, *supra* § 197, n. 2.

2. In bankruptcy, "Though there might be proof "against each of the estates, yet there was not to be "a dividend received from each of those estates; the "creditor must elect which he would go against. * "Where there are not two separate firms (made distinct "persons by the bankruptcy acts) the old (bankruptcy) "rule would remain untouched that the creditor must "elect which estate he would go against." Read v. Bailey, *supra* § 197, n. 2.

3. *Deceased partner's executor may prove against firm, if firm creditors disclaim proof against his separate estate.* A, in partnership with executor of his brother B, trading as A & B, dissolved in 1875, and died in 1878. B's executor continued under old name. No debts of the firm of which A was a member were presented, except beneficiaries of B, who proved against executor, who continued business, and disclaimed proof against A's estate. A's executor proved for his contribution, which he left as a loan. Objection, because codebtor with B's executor for the debt to B's beneficiaries.—Allowed. Proof would clearly stand until beneficiaries proved against A's estate. Andrews v. Wilcoxon, 25 Ch. D. 505 (1884).

4. The Bankrupt Acts of 1861, § 152, and of 1869, § 37, provide for contracts by two firms or by an individual and a firm. The language is: "Firms * in whole or "in part composed of the same individuals" or a 'sole "contractor' who is also one of the joint contractors." "One firm," said Lord BLACKBURN, "is A, B & C and "the other is A & B. There * you may say that firm "A & B 'in the whole' formed part of the firm A, B & "C."

Lord CAIRNS: "Whereas formerly there would have "been a right on the part of a creditor to come and "say—I will prove against C for the debt which he has "contracted, and I will come upon C's estate, and I will "prove against A's estate for the contract which A en-"tered into—and where the rule of bankruptcy to which "I have referred said, Though it chances that B is com-"mon to each of these contracts, though B is a con-"tractor with A in one contract, and B is a contractor "with C in the other contract, yet you shall not come "upon the estate of both A and C, you must elect "which you will take, the Legislature by these enact-"ments said, The fact that the firms with whom you "have contracted have a partner in common, or are in "whole or in part in common, shall no longer prevent "your proving against both." Read v. Bailey, *supra* § 197, n. 2.

"There may be another case: A, B & C may be trad-"ing as one firm, and the whole of those may not be "found in the other firm, only two of them or only one "of them may be found in the other firm, that would "come under the words 'in part.' There may be, "thirdly, the case of a sole trader, who is found also "trading in a firm with other persons." Read v. Bailey, *supra* § 197, n. 2.

If the common member of two, or more, firms is himself the only connecting link between them, he cannot join their respective transactions in a single account.

A common member cannot include the transactions of successive firms in a single account. A, partner in A & Co., composed successively (1) of himself, and sub-firm, B & Co., composed of B, C, D & E; (2) of himself and sub-firm, B & Co., late B, C, D & F; (3) of himself and sub-firm C & Co., composed of C, D & F. A brought bill against all his present and past co-partners, alleging that each sub-firm had defrauded him, and that the accounts had been kept continuously. Defendants demurred, because bill multifarious.—Demurrer sustained. Each combination formed a new firm, and the business of each firm was a distinct transaction. Sanborn v. Dwinell, 135 Mass. 236 (1883).

5. "When the bankrupt at the time of the adjudication is liable upon "any bill of exchange, promissory note or other obligation in respect "of distinct contracts as a member of two or more firms, and carrying "on separate and distinct trades and having distinct estates to be "wound up in bankruptcy, or as a sole trader and also as a member "of a firm, the circumstance that such firms are in whole or in part "composed of the same individuals or that the sole contractor is also "one of the joint * contractors shall not prevent proof and receipt "of dividend in respect of such distinct contracts against the estates "respectively liable upon such contracts." U. S. Rev. Stat. § 5074; Act of March 2, 1867, ch. 176, § 21.

6. *Partner's firm can't prove against agent doing business for partner or undiscovered principal.* A & B traded as A & Co. A transacted the business in England, and B in Canada. A established E in business as E & Co , advancing him money and selling him goods. B ascertained relation and ratified it. Upon bankruptcy of both firms, A & Co. proved for £7,490 11*s.* 7*d.* against E & Co.—Disallowed. A undisclosed principal of E, and could not prove against himself. In re Wakeham, 13 Ch. D. 43 (1884).

Firm creditors of bankrupt share his English estate only after deducting dividend received abroad. B traded in England as B & Co., and in Brazil, as B, C & Co. A, holder of B, C & Co.'s drafts, accepted by B & Co. upon the bankruptcy of B, proved against B, C & Co. in Brazil, and received a dividend. He then proved in England.—Entitled to share with English creditors, only after deducting dividend received from debtor in Brazil. Ex parte Wilson, L. R., 7 Ch. 490 (1872).

Double proof inadmissible where all the partners of one firm are members of another. B & C, partners in England, and B, C & D, partners in Brazil, dealt with each other. B, C & D, drew on B & C, in favor of A, who thought the firms were distinct. B & C accepted

draft. Both firms became bankrupt. A proved in Brazil against B, C & D, and received a dividend. He claimed the right to sue B & C in England, on the ground that after paying the debts the surplus of neither fund would go to the other.—Rejected. Goldsmid v. Cosgrove, 7 H. L. 785 (1859).

Lord CAIRNS' argument, based upon the Bankrupt Acts, was this: The surplus would go to the individual partners, B, C & D. The shares of C and D would not belong to them as partners in the firm of C & D, but as individuals, and would be the separate estate of B and of C. The creditors of B, C & D would not take both the joint and separate estates of their debtors within the bankruptcy rule. They would not even take the joint and separate estates as independent securities under the practice which allows both to be pledged to a creditor by express engagement, apart from the implied liability incurred by partners on a contract made in the transaction of firm business. They would simply take two joint, but different, estates in satisfaction of their claims. The result would be the same if the order of proof had been reversed, and a dividend had been received from B & C. The surplus would not go to the firm of B, C & D, but be divided between B and C as individuals. It would become the separate estate of B and of C.

CHAPTER VII.

ACCOUNT.

§206.

The account is an epitome of the partnership.

The nature of the account corresponds with the business undertaken by the partners. The account involves a settlement of all the transactions of the firm from its commencement. The principles which

govern the partnership relation are summed up in the account, and furnish the rules for adjusting the differences between the partners. The account, therefore, is nothing but the application of the principles already laid down under the different heads of this work.

All the transactions of the firm are upon joint account, and present no clear line of cleavage by which can be ascertained the rights or liabilities of a partner as against his co-partners in each case. Moreover, no single act stands alone, but each is bound up with all the preceding and subsequent transactions of the firm. Before a partner's standing as a creditor, or debtor, of his co-partners can be ascertained, it is necessary to resolve every transaction into its constituent parts, and establish the position of each partner as debtor, or creditor, in respect to that transaction, and the amount of his debit, or credit. A balance taken of the aggregate of these debits and credits will fix the standing of each partner as debtor, or creditor, of each of his co-partners, and the amount to which he is entitled upon distribution of the common fund, if there is any.[1] The necessity for resolving the firm transactions into their constituent parts is due to the fact that the form of the transaction between the partner and his firm does not correspond to its character. For example, a partner in a firm of three nominally borrows $1,500 from his firm, but, in fact, he borrows from his co-partners $1,000, or $500 apiece. A loan to the firm would be subject to a like analysis. A summary of these analyses is the firm account. The necessity for the account arises from the fact that it is the only process which can be made co-extensive

with the business, and can effect a full settlement of all its transactions.[2]

1. *Account gives defendant-partner every advantage he could obtain by a cross-bill.* A brought partner's bill for account. B filed cross-bill, charging false entries by A; his conversion of firm funds to his own use, and his buying up claims against firm at 50 per cent. since receiver had been appointed. A demurred.—Sustained, and cross-bill dismissed. B could set up, by way of defence to the original bill, all he seeks by cross-bill. Johnson v. Butler, 4 Stew. 35, N. J. (1879).

2. *Partner cannot sue co-partners on a firm transaction without account.* A sued his co-partners, B and C, for collusive settlement of firm claim for less than its amount. Defence: Account necessary to show A's interest. A obtained judgment for his aliquot share of the loss.—Reversed. Sweet v. Morrison, 7 E. Rep'r 389, N. Y. (1886).

Murray v. Bogert, *supra* § 171, n. 2.

Purchase of partner's share may get his advance by settlement, but can't carry on business. A enjoined B, who, at first, advanced A's co-partner, C, and then bought him out, and excluded A from business. B claimed stock at valuation and right to carry on business at mill.—Stock delivered to him and business closed up, receiver stating account. Wolbert v. Harris, 3 Hal. Ch. 605, N. J. (1849).

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§207.

The basis for the account is the joint property or estate of the partners, their responsibility for the obligations of the firm, and the good faith required in its transactions.

The contribution, with its inherent increment, reverts to the contributing partner. The property of the firm starts with the contributions of the partners. The theory which fixes the character of the contribution determines the questions arising in reference to the reimbursement of the capital, and to the payment of interest upon it.[2] If the contribution remains the separate property of the contributing partner, in spite of the fact that the firm holds the legal title during the continuance of the partnership, his co-partners incur no liability to make good the firm capital in

case it is lost or impaired. The contribution was at his own risk. He cannot claim interest, since he looks to the profits for a return upon his capital. Under any theory the contribution is always returned before there can be a distribution of the assets.

The partner contributing fungible property can reclaim only a like amount. A partner contributing specific property recovers it in specie, together with any enhancement which has not resulted from the intervention of the firm, subject to a deduction for any improvements made, or value conferred through the agency of the firm.

The profits are a part of the joint property, and must be included in the account.[3] Of course, no partner is deemed to guarantee the earning of profits to his co-partners; nor is he, in general, to be charged for not producing them. But the managing partner is bound to show why no profits have accrued. If he refuses to do this, there arises a doubt as to whether the want of success was not due to his own culpable mismanagement or neglect, which would form the basis of a debit against him.[4] On the other hand, one partner may guarantee to his co-partner a certain share in the profits. These agreements will be sustained and enforced in the account.[5]

1. *Creditors may compel payment of contribution by special partner.* B was special partner, and C & D general partners. B never paid in his capital. Firm failed, and C & D assigned to A for creditors. A brought bill against B to compel payment of capital.—Decree. Unpaid contribution a common fund, which partners or creditors may collect, especially as it would be exhausted in payment of debts. Robinson v. McIntosh, 3 E. D. Smith 221, N. Y. (1854).

Partners' quotas preliminary to account, and one's answer to copartner's bill stating them prima facie evidence. A brought bill for settlement against B & C, alleging that the three were equal partners. B admitted partnership, but denied equal shares, claiming 4-9 and conceding A 2-9.—Answer responsive, and fixed quotas. Eaton's Appeal, 16 Sm. 483, Pa. (1870).

Hartman v. Woehr, *supra* § 19, n. 8.

2. *Whether money put in a concern is a loan or a contribution is settled by mortgage subsequently created for the sum.* B, proprietor of a patent, applied to A, who advanced £1,000 to develope it. No security for loan, nor any arrangement for payment of principal or interest. They took a joint lease of premises, and B transacted business as B & Co. A made additional advances, and B & Co. received £6 a week out of the proceeds of the business. Subsequently, B mortgaged his patent to A, to secure his advances. He took a new lease in place of the original, which they surrendered, and sublet to B. He became bankrupt, and A proved for his mortgage debt.—Allowed, as A was, apparently, B's surety, and not his principal. Ex parte Macmillan, 24 L. T. 143 (1871).

Contribution a debt of firm, and each partner liable for his quota. A agreed to furnish the capital, and B his services, for the business, and share the profits equally. A's administrator sued B for the advances, but obtained judgment for only half, less firm assets.—Affirmed. Debt primarily of firm, and each partner liable only for half. Turner v. Turner, 5 S. W. Rep'r 457 (1887).

3. *Continuing business after expiration of term a renewal.* A was dormant partner, for a specified term, with B, who carried on business in his individual name. A's capital was not refunded at expiration of term, and B continued the business. A brought account for profits made after expiration of term.—Entitled, because continuing the business was a renewal. Parsons v. Hayward, 4 De G. F. & J. 474 (1862).

4. *Managing partner bound to prove why he didn't make profits.* A was partner with B, her brother-in-law. A furnished fixed capital; the floating capital was raised on joint credit. The losses were to be shared equally. B had exclusive management of business, and agreed to devote his utmost exertions to make it profitable. Business was apparently successful, and ended by mutual consent. A brought bill for account, and claimed profits, or proof that profits could not be made.—Maintained. B not exonerated by showing amount received, amount on hand, and expenditures, with proof of general integrity, but bound to show why he had not made profits. Stidger v. Reynolds, 19 Ohio 351 (1841).

5. Grant v. Bryant, *supra* § 35, n. 2.

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§ 208.

Priority upon distribution is given to advances and improvements.

An advance made by a partner to his firm is assimilated to a loan, but, as it is impossible to isolate the act from the other transactions of the firm, and hence there is no legal process to recover the loan,

the advance must remain in the firm until dissolution, and be included in the account.. By reason of its character as a loan, the advance is repaid before any distribution of profits or of capital.[1] This priority of an advance over profits and capital is called the lien of the lending partner in reference to the claims of his co-partners and their separate creditors.[2] The advance carries interest at any rate agreed upon, and is not obnoxious to the penalty of usury, because his quota of the sum advanced, and interest, is necessarily at the risk of the business.[3]

A withdrawal is the converse of an advance. Any property of the firm in the hands of one partner, either by way of detention of profits or of withdrawal of capital, is an item of debit against him.[4] The withdrawal may occur with the knowledge and consent of the co-partners, or it may be an unauthorized conversion of firm property.[5] If a partner is entitled to withdraw his annual living expenses, but fails to do so during any year, he can not claim a credit for the amount in the account.[6] The firm has no lien on the separate estate of a partner for sums unlawfully withdrawn by him, but such sums are a preferred charge on his interest in firm property.[7] If one partner withdraws his whole share, the other partner may claim interest on his capital and profits left in the business.[8]

1. *Partner's advances payable out of firm assets at actual value.* A, for 1-3 interest, contributed land, and B money, for 2-3 interest, and subsequently made advances. B, who held title to land, conveyed whole property of firm to a corporation, organized to carry on business, for 6,000 shares of its capital stock. A claimed 1-3, subject to an account.—Entitled to 1-3, less his proportion of advances, estimated in stock at actual, not nominal, value. Cheeseman v. Sturges, 6 Bosw. 520, N. Y. (1860).

Partner's lien for advances. B & C, partners, in 1876, for 3 years. B contributed the use of his plates and option to buy them at valuation of $92,769.17, for a 2-3 interest, C contributed the stock of a publishing

business, at $29,519.87, for 1-3 interest. C indebted at the time, in the aggregate $62,750.82, to 20 different creditors, among them B, $15,050. Articles provided, less current expenses, for payment at dissolution of C's debts, and for equal division of the surplus assets between B & C. Profits, $29,990.87, divided during the term. At expiration, assets available for creditors were $18,110.61. But B had advanced $6,556.61 to C, for his creditor, and claimed a preference for this advance, with interest. He also retained assets to pay his debt of $15,050 in full. A *et al.*, creditors of C, brought bill to enforce the articles.—Decree. A *pro rata* distribution awarded among C's creditors, B included, after B's lien for advances had been satisfied. Zell's Appeal, 1 Am. 532 (1886).
Wood v. Scoles, *supra* § 35, n. 1

2. *Partner may follow stock diverted by co-partner.* B, without A's knowledge, sold out their joint stock in Mo., and took the proceeds to Cal., where he carried on business. A went after B to recover his share, took a note for part, and attached B's stock for the balance. C, who sold merchandise to B, knowing nothing of A, intervened, and denied A's right.—Judgment for A. B's act a dissolution of Mo. partnership at A's election. C, therefore, B's separate creditor, and A entitled, if not to a preference, at least to a claim as a creditor. Strong v. Stapp, 15 Pac. 835 (1887).
Hill v Beach, *supra* § 165, n. 1.

3. *If partnership deed is alleged to be part of usurious scheme, the fact must be proved by verdict.* A & B agreed, by deed, to be partners for 10 years. A advanced £20,000, and B covenanted to provide an equal amount, to pay A £2,000 a year out of profits, or capital, indemnify him against loss, and repay £20,000 at end of term. B had exclusive management of business. At expiration of period, A sued B for £20,000, and interest. Plea, that deed was executed as part of a usurious agreement.—Usurious scheme, though averred, was not found as a fact by jury, and was, therefore, ignored. A was liable, as a partner, to third persons, under the deed, and was also a partner with B, though not liable to him for contribution to pay firm debts. Gilpin v. Enderby, 5 B. & Ald. 955 (1822).

4. Buckingham v. Ludlam, *supra* § 165, n. 3.
Partner, if stakeholder for co-partners, must pay interest if he uses the joint funds. A held firm money pending account between his co-partners, B and C; each notified him not to pay over to the other. Master charged him interest on this balance.—Sustained. If money held in readiness to pay B and C as soon as they settled the account, no interest; but A used it, and must pay interest for use. Coddington v. Idell, 3 Stew. 540, N. J. (1879).

5. *Fraudulent vendee of co-partner proper party in account.* A sued B for injunction and receiver, and fraudulent sale of firm property to C, and made C co-defendant, who denied fraud and objected that his joinder introduced new cause of action and made complaint multifarious.—Decree: If sale set aside, must account with the partners. Webb v. Helion, 3 Rob't 625, N. Y. (1864).

6. *Living expenses.* Articles permitted A to withdraw from firm what was necessary for his private expenses. In settlement, A sought to charge firm with rent of a house owned and occupied by himself during continuance of partnership, and with the cost of furnishing it.—Disallowed. Question not what is required for A's maintenance, according to his station. His claim limited to current expenses, so far as his private means were insufficient. Failure to withdraw in any

year proof of ability to maintain himself. Stoughton v. Lynch, 6 Johns. Ch. 467, N. Y. (1815).

7. *If partnership denied, no injunction to restrain alienation of land bought with alleged firm funds; Partner no lien for a withdrawal.* A & B manufactured gas in partnership. B, who had no means, and was, in fact, insolvent, bought lands, and put the title in C, his wife's name. He died, and A enjoined C from disposing of the lands. C denied purchase with firm funds, and moved to dissolve.—Dissolved; because the fact of purchase with firm funds denied. Query: Has A a lien, as partner, on B's individual land, conveyed in fraud of creditors? General creditor has not, until he obtains judgment, and partner who paid him would stand in his shoes. Holdredge v. Gwynne, 3 C. E. Gr. 26, N. J. (1866).

Land bought with firm funds, and used exclusively for firm purposes, not liable to dower by widow of partner indebted to firm. B and his co-partner, who had agreed that at dissolution firm property should be sold for firm debts, bought land and erected buildings upon it for their brass and iron foundry. Creditors recovered judgments against them, and took the premises in execution. B, who had 1-5 of the profits, died, indebted to the firm. A, B's widow, brought bill for dower.—Dismissed. B's beneficial interest subject to firm debts, and his possession a technical seizin, which gave wife no right to dower. Agreement converted land into personal estate. Greene v. Greene, 1 Ohio 535 (1853).

8. *Judgment against partner who has assigned his interest to co-partner.* A enjoined B. A had contributed $6,000, and B $2,000, and B claimed subsequent advance of $3,000. On settlement, balance due A $30,000, and deficiency of assets to pay him $8,000. B promised to make up deficit, and, as he did not, firm dissolved. B assigned his interest to A, in payment, but subsequently refused to deliver up assets, on ground that statement, made by him as basis of settlement, showed A received interest on profits and on interest.—Maintained. B's interest gone, and allowance of interest on what left in business. Large v. Ditmars, 12 C. E. Gr. 283, N. J. (1876).

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§209.

The good-will is property and an asset of the partnership.

The good-will of a business is the property of the firm, since it is the result of the joint labors of the partners.[1] If the good-will is sold by a partner, he must account to the firm for the proceeds. If he has secured to himself, after dissolution, the exclusive enjoyment of the good-will, he is charged with its value in the account.[2] This might arise in various

ways; for instance: When a partner continues the business of the firm, or where the firm carried on business upon the premises belonging to one partner, of which he has become repossessed at dissolution, he must capitalize the good-will, and account for its value. This is the condition upon which he may resume the possession of his property. The good-will, in this respect, resembles the improvements made by the firm upon the property of a partner.

The Courts will not permit the good-will to be sacrificed upon dissolution, and, in order to preserve it, will, if necessary, compel the partners to bid against each other for its exclusive enjoyment.[1]

1. The reputation of the firm remains the common property of the partners after dissolution. No single partner has the right to style himself successor to the late firm. This reputation is not part of the good-will, and does not pass with it without special agreement.[a]

a. *Partner who has purchased the good-will cannot style himself successor to the firm.* Dentists, who practiced as A & B, dissolved partnership, B buying the fixtures and unexpired lease of premises. He put up a sign: "successor to A & B." A applied to enjoin the appropriation of firm name.—Injunction granted. Good-will of stand passed, but reputation of firm remained property of both members. Morgan v. Schuyler, 79 N. Y. 490 (1879).

On the other hand, the partner who has sold out to his co-partner, including the good-will, may compete with his former co-partner in the same business, provided he does not use the late firm name, or style himself its successor.[b]

b. *Partner selling good-will may compete with firm.* B sold out to his co-partner, A, including good-will, receiving some firm claims in settlement, and then set up a rival establishment near by, in his own name. A sent him decoy orders, addressed to firm, and enquiring whether B succeeded them. He filled orders, enclosing his individual card, but never answered the question.—A's injunction refused. B entitled to compete if he did not use firm name, or style himself successor. He might open letters addressed to firm, as he was interested in firm claims. White v. Jones, 1 Rob't 321, N. Y. (1863).

Partner selling good-will forfeits price if he tries to destroy the business. Use of firm name a trade-mark, which passes by sale of good-will and covenant of seller not to use rm name. B sold out to A all

the assets and the good-will of the firm B & Co., covenanting not to use the firm name. B took mortgages and notes in part payment. He started business for himself, imitated the firm names, brands, bill-heads, cards; held himself out as successor of the firm, and enticed away firm customers and employees. A brought bill to restrain B's assignment of notes and mortgages, and to have his damages declared a payment.—Decree. Although the assets and good-will were sold in the lump, evidence admissible to show value of good-will and the damages resulting from B's conduct. The right to old firm name as a trade-mark passed by the assignment. Burkhardt v. Burkhardt, 42 Ohio St. 474 (1885).

If the good-will is assigned to one of the partners, it includes the right to use a trade-mark, even though the trade-mark be the name of the selling partner;[c] but if no disposition is made of the good-will, both partners retain the right to use the firm trade-mark and to manufacture and sell under a firm patent.[d]

c. *If partner's name a trade-mark, it passes with the good-will.* Soap manufacturer, C, who used his name as a trade-mark for 'Mineral' and for 'Pumice' soap, formed a partnership with A, contributing, with the implements of manufacture and the fixtures, the good-will of the business. Upon dissolution, C sold out all his interest in firm property and assets to A & B, who enjoined him from trading as successor to the firm,—Decree. C's name connected with soap indicated a formula for its manufacture, and passed with the good-will of the business. C might use his name, but not to interfere with customers of A & B. Hoxie v. Chaney, 143 Mass. 592 (1887).

d. *Trade-mark or patent for firm business part of good-will, which each partner may use if undisposed of on dissolution.* A & B, who had manufactured fanning mills at X for ten years, dissolved, each taking part of the stock and implements of manufacture. A enjoined B from manufacturing and selling the mills with an improvement which he had patented during the continuance of the firm, and the name of which he called his trade-mark.—Dismissed. Improvement a part of good-will, and, being undisposed of, each might manufacture and sell it, provided he did not charge the other by his transactions. Smith v. Walker, 57 Mich. 459 (1885).

2. *Continuing partner must account to the firm for full value of good-will.* B excluded A from firm, and continued the business himself. A brought bill for account of profits and good-will.—Decree. A recovered his share of the profits and one-half the value of the good-will, which was appraised at $900. Sheppard v. Boggs, 9 Neb. 257 (1879).

3. Slemmer's Appeal, *supra* § 180, n. 5.

Retiring partner has no right to appropriate the good-will. A was publisher and B the editor of a journal, styled 'Household Words.' B dissolved, and announced, by advertisement, that Household Words would be discontinued, and that he had transferred himself and all the editorial staff to a new journal, the publication of which he was about to begin, entitled All the Year Round. A enjoined B from announcing the discontinuance of Household Words.—Injunction continued. B was ordered to limit the announcement to his own retirement. Right to use the name Household Words was ordered to be sold on firm account, and brought £3,550. Bradbury v. Dickens, 27 Beav. 53 (1859).

§210

All payments made in discharge of firm obligations are items of credit, except obligations *ex delicto*, in which the partner claiming the credit was an accomplice.

The obligations of the partners for acts done in the course of the business may arise either from contracts or from torts. The liability incurred by a partner on the contracts of the firm is not necessarily an item of credit in the account, unless he assumes the obligation to pay the entire debt.[1] The account implies the previous discharge of firm obligations.[2] An outstanding debt, unless assumed by one partner, is no part of the account between them, because, while each is liable for his quota, no partner has paid his part of the debt. If, however, a partner has subjected the firm to contractual liability by an unauthorized act, and the obligation has been discharged with firm funds, the item is properly a debit against the partner's share. The same thing is true where the firm has been made responsible for the tort of a partner, and has paid the damages. If the co-partners were accomplices in the tort, no partner will be debited with any portion of that outlay.

If one partner has been compelled to pay a debt of the firm, whether arising *ex contractu* or *ex delicto*, his disbursement is an item of credit to him in the account, and is, in fact, an advance.[3] Compensation for services is, of course, not allowed as a credit, without an express agreement.[4]

If, however, the partner who paid out of his separate estate the damages recovered against the firm in an action *ex delicto* was himself privy to the tort, he

cannot claim credit for the disbursements, because the law will not allow a co-tortfeasor to enforce contribution, either directly or indirectly.

1. *Administrator of partner may recover his share, giving indemnity against contingent liabilities.* B, C & D, partners. B died, and A, his administrator, sued C for admitted balance in his hands. Defence: 1, Contested claims outstanding against the firm; 2, bad debts; 3, suit against city for a firm claim.—Recovered, less a sufficient sum retained to cover B's share of bad debts, upon giving a refunding receipt against claim and costs of litigation. Roberts v. Law, 4 Sandf. 642, N. Y. (1851).

2. *Retiring partner liable for his share of bad debts.* A, B & C bought out D, and indemnified him against all except his proportion of the bad debts. They sued him for his share of such debts.—Liable. Buchanan v. Cheeseborough, 2 Duer 238, N. Y. (1856).

3. *Partner may claim credit in account for amounts advanced in payment of firm debts, together with interest. Profits earned after dissolution by death on pending contracts, no part of the account when executors of deceased partner have sold out to survivor.* Executors of deceased partner, B, sold out to surviving partner, A, the stock, fixtures, patent rights and lease of warehouse, A assuming the rent and wages of employees which accrued after testator's death. In a bill by A, for account, he claimed credit for amounts advanced in payment of firm debts, with interest on advances. B's executors claimed the profits made on pending contracts under the patents.—Claim of A allowed; of B's executors rejected. Sale carried outstanding contracts. Collender v. Phelan, 79 N. Y. 366 (1879).

If notes for partner's share of firm indebtedness are endorsed by firm after dissolution without a co-partner's knowledge, act does not release him. A *et al.*, B *et al.*, *and* C *et al.*, went into partnership in pork-packing for the season. After dissolution, as the bank refused B *et. al.'s* notes for their share of firm indebtedness without security, the firm endorsed them in C *et al.'s* absence. A *et al.* and B *et al.*, who paid the notes, demanded account and contribution from C *et al.*—Recovered. Although there could be no recovery on the notes against the firm, payment by plaintiffs was of original firm debt. Gardiner v. Conn, 34 Ohio St. 187 (1877).

4. *A partner may recover costs of litigation for firm, but not compensation for his services in conducting litigation, unless by express agreement.* D joined A, B & C, engaged in furnishing volunteers for army, and each party took 1-2. They furnished 24 soldiers, and received a city bond of $400 and $350 scrip for each man. D converted certificates into bonds, and paid over $8,000 to A, B & C. City repudiated contract, and holders sued. D, acting for firm, joined plaintiffs in test suits, and paid over $4,700 on account of money collected by him to A and B, having bought out C's share. A and B brought account. D claimed (1) compensation for services in litigation and (2) costs of litigation.—Without express agreement, no right to compensation for services rendered the firm, but entitled to be reimbursed costs of litigation. Coddington v. Idell, 2 Stew. 504, N. J. (1878).

A surviving partner has, in general, no better claim to compensation than any other; but his claim has been

allowed when he has been compelled to continue the business at his own risk in order to preserve the joint property.[a]

a. *Surviving who continues business in the joint interest of himself and deceased partner's estate entitled to compensation.* A, surviving partner of B, continued business to protect good-will, with a view to sell the establishment as a going concern. After a sale of the establishment, B's executor brought account, and claimed a share of the proceeds of the good-will. A demanded compensation for his services as manager since B's death.—Allowed. A continued business at his own risk, for the joint benefit in which the executors claimed their share. Cameron v. Francisco, 26 Ohio St. 190 (1875).

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§211.

The profits, or losses, of an illegal transaction, or business, forms no part of the account.

No partner can demand an account of an illegal transaction, whether it constitutes a part[1] or the entire business of the firm.[2] The fact that the transaction is closed, the profits capitalized, and transmuted into a different kind of property, as, for example, the investment of money in mortgages, does not alter the situation.[3] The property, in whatever form, remains the product of the illegal business. But a distinction may properly be taken, when the partners invest their illegal profits in a new and lawful enterprise which they conduct on joint account. The account which might be demanded of this new business will involve nothing but lawful acts, and will not include the division of the proceeds of the illegal business, because that was accomplished when the partners settled their respective interests in the new venture.

Where a partner has paid his contribution with trust funds, and the *cestuy que trust* has reclaimed

them from the firm assets, the contributing partner is debited with this amount, as in the case of a withdrawal. If the innocent partner has been compelled to pay the *cestuy que trust*, he may claim credit for his disbursement. But if privy to the embezzlement, he could not claim credit for his payment, because that would be asking contribution from his co-tortfeasor.

1. *No account can be demanded where the business was in part illegal.* A & B were partners in business as merchants, and traded largely, though not exclusively, in contraband cotton; all the business was done with Confederate money. After the war, A brought bill for an account.—Dismissed. The business was partly illegal, and a separation of the lawful items from the unlawful was impossible. Furthermore, as the balance, if any, must have been expressed in Confederate money at the time of dissolution, and as that currency has been blotted out, there could be no recovery. Lane v. Thomas, 37 Tex. 157 (1872).

2. *Illegal partnership a defence to partner's bill for account.* B, an attorney, agreed to give A, his clerk, 1-3 of profits, in lieu of salary, but A was not to be a partner. A brought bill for account. B demurred, on ground that an answer might criminate him, under 22 Geo. 2 C. 46, s. 11, by showing a partnership with C, who was not an attorney.—Sustained. Tench v Roberts, 6 Madd. Ch. 145 (1819).

Lotteries, though lawful in State granting the franchise, not lawful in a different State by comity. A brought bill, as partner, for discovery and account against B, of lottery business, which had been carried on for 3 years under franchises granted by four States.—Dismissed. Comity would not make a nuisance lawful. Watson v. Murray, 8 C. E. Gr. 257, N. J. (1872).

Partners may lawfully agree upon a minimum price in firm contracts. A & B, partners, agreed not to furnish recruits for less than $500 per man. A brought account against B. Defence: Agreement against public policy, because it prevented competition.—Decree. If object of partnership to prevent underbidding, as individuals, the combination would be unlawful, but A & B did not contemplate any particular public offer, nor any conspiracy to control prices. Marsh v. Russell, 66 N. Y. 288 (1876).

Partners in an illegal business can't compel an account of gains made by co-partner in competition with firm. A and B were partners for trading in cotton beyond the union lines, and bought certain cotton in conjunction with C. While the cotton was on the ocean, C became alarmed for its safety, and B secretly bought his interest, for $3,500. The cargo arrived safely, and sold for a sum which gave B a large profit on the share purchased of C. After settlement, A discovered the facts, and brought bill against B, to compel an accounting for the secret profit.—Dismissed, because the business was illegal. Dunham v. Presby, 120 Mass. 285 (1876).

3. *Contra. When the profits of an illegal business are invested in lawful property, the law protects the partner's shares.* A & B, partners, bought up soldiers' claims for land warrants, contrary to Act of Con-

gress. B managed the business, and converted the lands into money and mortgages. By concealing the real value of the assets, he bought out A's interest for a song. A brought bill for an account and division.—Decree. The business was closed and the capital converted into different assets, and B could not deprive his partner of his lawful share. Brooks v. Martin, 2 Wall. 70 (1874).

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§ 212.

Every advantage gained by a breach of good faith is a firm asset, and every loss a charge against the wrong-doer.

The breach of good faith between the partners may occur through a breach of the partnership contract, or a violation of the duty implied by the relation. The duties implied by the relation cover not only transactions which take place during the continuance of the firm, but also transactions which lead to the formation of the partnership, and which arise out of its dissolution. But the breach of good faith must clearly appear.[1]

Any loss or damage which results to the firm, or to a partner in his separate estate, by reason of a violation of the express or implied provisions of the partnership agreement, is an item of charge against the wrong-doer, and of credit to the injured partner.[2] For example, the premature dissolution of a partnership entered into for a definite term, or a failure to make a contribution as agreed.[3] The fraud by which a partner is induced to enter a firm would charge the wrong

doer for indemnity against any losses or liabilities incurred in the business. This indemnity is an item in the account.[5]

A partner is chargeable in the account with any profit made by him in competition with the firm without his co-partner's consent. The unlawful competition may occur where the partner secretly engages on his own account in the same kind of business as his firm. Also where he has dealings with his firm either as buyer or seller, and withholds information which would affect the price, or where he seeks to retain a profit secured by means of his position,[6] or where he obtains a secret profit out of purchases, or sales which he makes on behalf of the firm.[7] If the partner is, without objection, a common member of two firms in the same line of business, his partners in one firm cannot require him to account for his profits in the other. If the two firms deal with each other in good faith, the common member cannot be charged by his partners in one firm with any profit which accrued to the other firm out of the transaction; but if the common member, in the interest of one firm, withholds from his co-partners in the other information which affects the transaction, he is chargeable with the entire loss suffered in consequence of the suppressed information.

The principles just stated apply to the liquidation of a partnership as well as to a going concern.

If, in the settlement of the partnership business, one partner gains an advantage over another, and gets more than his due share, by reason of a mistake, or by withholding information which would affect the division of the assets, the settlement will be opened,

and the partner surcharged with the amount of his advantage.[8]

Where a partner has, during the continuance of the firm, prepared the way for entering into a transaction in the line of the firm business, and dissolves for the purpose of securing the benefit to himself, he is chargeable in the account for any profit gained.[9]

1. *Partner, who is trustee for deceased partner, may buy his share at expiration of partnership.* A & B, partners. A died, and his will directed the main business to be continued for one year, according to the articles. A made B and C trustees for his heirs, with power to sell and re-invest his property. B sold a branch house in St. Louis, and subsequently bought 1-6 of the purchaser, and continued the branch in partnership with him. At end of the year A's share in the main business was appraised, and B bought it at the valuation. A's heirs and devisees asked to set aside conveyances, and compel the trustees to carry on the business for A's estate.—No evidence that when the branch was sold B intended to buy it back, and entitled to buy A's share in the main business at the appraised value after the year. No claim for good-will. Rammelsberger v. Mitchell, 29 Ohio St. 22 (1875).

2. *Breach of agreement not to engage in trade outside the partnership gives right to damages, but not to profits of independent business.* A and B entered into partnership, the articles providing that neither partner should engage in trade outside the partnership. B did so engage in another firm of B & Co., and after B's death A claimed, as against B's heirs, to be entitled to an equal division in the share of B in the profits of B & Co.—Rejected, and judgment for B's heirs. Affirmed on appeal. B's violation of the partnership agreement might give rise to an action for damages by A, but as he would not have been liable for the debts of B & Co., he could not claim to be a partner therein, even unaware. Murrell v. Murrell, 33 La. 1233 (1881).

3. *Damages for dissolution.* By articles, three months' notice required for dissolution. B dissolved without notice, and A sued for damages. —Recovered. Measure of damages prospective profits for ensuing three months, estimated by reference to profits of past six months, and not mitigated by A's profits in another business, begun during the three months. Bagley v. Smith, 10 N. Y. 489 (1853).

4. *If partner breaks contract, Chancery will date dissolution from breach, and award subsequent profits to co-partner.* A had a contract with State to construct a canal. B & C agreed to furnish capital, in $3,000 instalments, for an equal interest in the undertaking, and stipulated to be reimbursed, capital and costs, out of State payments before any division. B received a payment, which he concealed from A, and used with C in speculation. A, discovering the fact, notified them of dissolution, and proceeded with the work alone, and made profits. A brought bill.—Decree. Dissolution dated from notice, and subsequent profits belonged to A, who furnished labor and contract, while B & C did not furnish contribution of $3,000. Durbin v. Barber, 14 Ohio 311 (1846).

5. *Fraud in forming partnership gives an assignable claim to correct a settlement.* B sold C 1-2 of vessel at cost, and C became his partner in trading adventure. After final settlement, C discovered misrepresentation of cost, and assigned his claim to A, who sued to vacate settlement and recover cost.—Recovered. Sheldon v. Wood, 2 Bosw. 267, N. Y. (1857).

6. *Possibility of renewal of lease a firm asset after dissolution.* A & B dissolved and, after bidding with each other for the lease of firm premises with right of renewal, came to no conclusion. B took a renewal in his own name. A filed bill for account.—Decree. B must account to firm for value of lease. The possibility of renewal a firm asset in liquidation. Johnson's Appeal, 5 Am. 129, Pa. (1886).

If some of the partners are lessees, and not the firm, they alone are entitled to exercise the option to renew, and may retain its value.

Option of lessees, who are partners, to renew a lease, does not enure to firm for benefit of co-partners. B & C, in October, 1860, leased a quarry, for three years from January 1, 1861, with the option to renew. In December, 1860, they formed a partnership with A, for working stone, to continue for three years, and for so much longer as B & C continued lessees of the quarry. A clause prevented the lessees from assigning. B & C were bound to furnish the firm with stone quarried, at cost. They refused to exercise their option to renew, and, in December, 1863, formed a new partnership with other members, taking a different lease. A brought a bill to enforce a continuance of the partnership for six years, and compel B & C to exert the option to renew for benefit of firm.—Dismissed. Lease did not belong to firm, at law or in equity. No agreement for it, express or implied, but left in defendants by contract, which bound them to work quarries. Also a prohibition against assignment to firm. Defendants had right to refuse to renew, though for purpose of getting rid of A, as continuance at their option. Phillips v. Reeder, 3 C E. Gr. 95, N. J. (1866).

7. *The secret gains made by partner, who acted as agent for dealers with firm, must be accounted for to co-partner.* A, manufacturer of machinery, at Patterson, and B, merchant, at New York, went into partnership, in 1859, and continued until 1872, when they organized a corporation, the A & B Manufacturing Co., though without dissolving the partnership. In 1876, A brought account for secret profits made by B in transacting the business. He plead Statute of Limitations.—No bar. B acted for both buyer and seller, and rendered A liable for his accounts. The profits, when received, might be shared by A. Todd v. Rafferty, 3 Stew. 254, N. J. (1878).

8. *Though equity denied by answer, injunction may be continued.* B, to save A's separate property from sale on a mortgage, bought it. On dissolution, B's title to mortgage was recognized, but A subsequently enjoined him from selling under it, alleging fraud in settlement, and firm title to mortgage. B denied, in his answer, A's equity.—Injunction maintained, though upon condition that A should pay sum into court. Murray v. Elston, 8 C. E. Gr. 127, N. J. (1872).

9. *Lease, secretly renewed by partner, a firm asset.* A, B, C and D, partners at will, took a lease from E, for 5 years, in firm name, B & Co., with an understanding that E would renew. September 11th, B, C and D secretly secured a renewal, and on the 18th notified A of dissolution on January 1st. A assigned to B, C and D all his interest

in the partnership, except his claim for and the value of 1-4 the lease. Defence: Evidence of conversation between B, C and E, that B and C intended to dissolve at the time of renewal, and that E had renewed without reference to any prior agreement.—Judgment for A. Lease renewed before notice of dissolution a firm asset, whether lessor bound to renew or not. A's percentage, under code, allowed upon his 1-4 interest as the amount in controversy. In an account, successful party might recover percentage upon the whole fund. Struthers v. Pearce, 51 N. Y. 357, 365 (1873).

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§213.

The account may be barred by the Statute of Limitations or by laches.

The action for an account may be subjected to the bar of the Statute of Limitations.[1] The Statute does not run from dissolution, but from the date of the last firm transactions.[2] Although the Statute does not in terms refer to the action, yet the right to an account may be lost in Equity by delay.[2] The partnership relation is not a technical trust, and the right to account comes, properly, within the equitable rule against laches.

1. *Partner's bill for account barred by Statute of Limitations.* Upon dissolution, in 1853, A & B agreed to submit all differences to arbitration. The arbitrators met in 1860, and B attended. A brought bill for account in 1867, and averred that when B attended, in 1860, he refused to proceed, and promised to appear again in three months, but never appeared again. The arbitrators declined to act. B denied his promise to attend again afterwards, and pleaded Statute of Limitations.—A bar in Equity as well as at law. Cowart v. Perrine, 3 C. E. Gr. 457, N. J. (1867).

2. *Statute of Limitations runs between partners only from settlement of account.* A traded in his individual name, and B was a dormant partner. They dissolved in 1872. C brought suit against A, which ended in 1876, in a judgment for A, who, in 1878, brought bill against B for account. Defence: Statute of Limitations, and interest on advances.—Recovered. Statute runs only from settlement of outstanding claims, or, at least, presumption of payment. No interest allowed without agreement. Prentice v. Elliott, 72 Geo. 154 (1883).

3. *Partner's bill for account barred by his laches.* A & B, country merchants, dissolved partnership in 1852, and made B liquidating partner. A was indebted to B, and C was his surety, to whom A assigned his interest, in 1860. The debt was gradually paid off, the last instalment to B's executors, in 1872, the year he died. In 1874, C, who had been employed by B, and had access to the books, brought account.—Refused. Laches not to bring bill when full equity could be administered to both parties. Stout v. Seabrook, 3 Stew. 187, N. J. (1878).

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§ 214.

Transactions not connected with the firm business are excluded from the account.

The exclusion of what does not pertain to the partnership business is involved in the adaptation of the account to the firm transactions.[1]

On this ground the separate transactions of a partner have no place in the account.[2]

1. *Balance of partnership account a set-off to judgment against individual partner.* B & C, partners. B conveyed of his land an undivided half to C, and took bond and mortgage for price, and assigned them to A. Before assignment to A, C obtained judgment against B for balance of partnership account. A foreclosed. C's defence: Set-off of judgment.—Judgment allowed as a set-off. The mortgage being an independent transaction, did not form an item in the partnership account. Reid v. Gardiner, 65 N. Y. 578 (1875).

2. *Partner should bring cross-bill, and set up account in a different partnership in his answer.* A brought account against B, for running stage line under contract with U. S. B set up A's indebtedness to him on individual account, and out of a farm owned by A, B & C, and out of which C was also indebted to B.—No set-off. No connection between U. S. mail route and firm, except horses fed with products of farm, and farm received manure in return. Brewer v. Norcross, 2 C. E. Gr. 219, N. J. (1865).

Account between individual partners excluded from firm account. Profits in a partnership, made in 1865, were to be shared thus: A 1-10, B 4-10 and C 5-10, with provision for quarterly accounts. At end of 1872, B promised A 4-10, and 3-8 for 1873. In 1876 B brought account against A and representatives of C, who had died. A claimed in the settlement his allowance by B for 1873, which was excluded as an independent transaction between A and B. Subsequently A sued B upon his promise. Defence: Claim was without consideration, involved in partnership account, and barred by former adjudication.—Recovered; right reserved by original decision, which excluded claim;

promise supported by consideration of A's remaining in firm, and share for 1873 ascertained by quarterly accounts. Emery v. Wilson, 79 N. Y. 78 (1879).

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§215.

A decree for an account is not essential.

The partners may anticipate the law and settle their own affairs without the aid or intervention of legal process.[1] This may be accomplished by agreement, or by submitting the settlement to arbitration.[2] Either method is available for the partners.

In a settlement made out of Court, the terms are interpreted in accordance with the rights, duties and obligations of the relation.[3] It is assumed that the partners meant to carry out the original purpose in the settlement, as well as in the transactions of the joint business.

The construction put upon the submission to arbitration is in favor of a retention by the Court of its jurisdiction.[4] The partners must exclude the judicial control by positive stipulation, or the Courts will not refuse their aid to rectify an error of the arbitrators.

1. *Account stated binds the partners, though unsigned.* By articles, B was to keep the books and render periodical accounts. A, in 1812, assented to, but did not, sign the accounts which B rendered, and partnership was dissolved. In 1826, A demanded an account from B's executors, on the ground of fraud and misappropriation. Defence: Account stated.—Want of signature immaterial. Account conclusive, except for last year. Heartt v. Corning, 3 Paige 566, N. Y. (1832).

Balance sheet, struck by a partner, competent evidence against him, though unsigned. A & B were partners. They dissolved, and A sued B for £314, his share of partnership balance. A offered in evidence balance sheet, in B's handwriting, though without his signature. B claimed, as set-off, £802, a debt lost by A's negligence, as liquidating partner.—Balance sheet competent evidence, and set-off allowed, if B's negligence proved. Jessup v. Cook, 1 Hal. 434, N. J. (1798).

2. *Discretion conferred by articles to submit not controlled, unless partner charging fraud makes out prima facie case.* Articles between A, B & C provided that if business was not managed or did not result to B's satisfaction, he might dissolve and refer difference to arbitration. B gave partners required notice of dissolution and arbitration. A brought bill to prevent dissolution and reference. He charged B with fraud.—Dismissed, and reference ordered. Discretion of partner charged with fraud, who wished public trial, not controlled, but only of partner charging fraud. Russell v. Russell, 14 Ch. D. 471 (1880).

The partner who relies upon a settlement must prove that it has been made.

If answer sets up stipulations of settlement, defendant must prove them. A & B dissolved partnership. A brought account, on ground of no settlement. B set up, by answer, A's agreement to take assets, pay debts, and assume all liability. He averred collections by A, and his liability on the settlement notes.—No sufficient evidence of the terms stated by B in his answer of the settlement. Account ordered. Dickey v. Allen, 1 Gr. Ch. 40, N. J. (1838).

3. *Settlement opened to make partner, who competed with firm, account for profits.* A, B, C, D *et al.*, stationers. C and D secretly bought plates and copyright in their own names, paying with firm money. They sold copies to the firm at a profit, and charged the expenditures to a printer as seller. A and B, on discovering these facts, sought to open a settlement.—Allowed. Transaction a fraud, because C and D competed with the firm. They were allowed price of plates and copyright, which were awarded to firm. Herrick v. Ames, 8 Bosw. 115, N. Y. (1861).

Agreement that partner's debt to firm shall be taken out of surplus is not a release if there be no surplus. A was liquidating partner. B, his co-partner, was indebted to the firm. They arranged that A should take amount of B's indebtedness out of his share of the surplus, after paying debts. There being no surplus, A sued B for his indebtedness. Defence: Discharged by the agreement.—Recovered. Contract interpreted not as a novation, but as a plan of distribution on basis of partner's continuing liability. Sayre v. Peck, 1 Barb. 464, N. Y. (1847).

Settlement between partners binding, unless fraud. Evidence disproved fraud in settlement, and showed full opportunity for examination by A.—Binding. Murray v. Elston, 9 C. E. Gr. 310, N. J. (1873). Affirmed. E. & A. 9 C. E. Gr. 589.

Partners cannot rescind settlement accepted by third person. A, in settlement with B, agreed to take the assets and give up mortgage of C, contributed by B. A sued C on mortgage, and objected to evidence of agreement until completed by delivery.—Judgment for C. Knowledge of settlement and acceptance by C binds A and B without delivery of possession. Benson v. Tilton, 58 N. H. 137 (1877).

Award, allotting one business to each partner, not enforced until cash consideration paid. A & B, who traded as merchants, and also as tailors, dissolved, and submitted to arbitration. Tailor store, with its debts, awarded to A; other business, with its debts, to B, and A ordered to pay B $470. A brought injunction to prevent sale of his property to satisfy judgments for debts arising out of B's business. B answers that A had not paid the cash.—A no equity as surety until he paid the $470. Runyon v. Brokam, 1 Hal. Ch. 340, N. J. (1846).

4. *Arbitration clause does not oust court's jurisdiction.* Articles provided for settlement of disputes between partners by arbitration. A dissolved, and demanded an account and a receiver.—Entitled to a decree. Kapp v. Barthan, 1 E. D. Smith 622, N. Y. (1852).

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§ 216

Jurisdiction of the account.

A Probate Court's jurisdiction over a deceased partner's estate does not justify an account, which involves a settlement of the shares of all the partners. The competence of the Court is measured by the deceased partner's share. The co-partners are not amenable to the jurisdiction. It is only by consent of all the partners that the Probate Court can exercise jurisdiction over the partnership, and make it accessory to the single partner's estate.[1]

The jurisdiction of the account depends on the domicile of the partners, not the forum to which they must resort to collect their assets.[2]

1. *Orphan's Court has no jurisdiction of claims arising from unsettled partnership account.* B & C, partners. B died, and C assigned to A for benefit of creditors. A offered to prove against estate in hands of B's administrator for alleged balance of unsettled firm account due C.—Dismissed, for want of jurisdiction. Ainey's Appeal, 11 W. N. C. 568, Pa. (1882).

Where Orphans' Court has assumed jurisdiction of a partnership account with consent of all parties, its decree will stand. A, B & C, partners. B died, and A became his administrator. Without objection on the part of C, A undertook to settle the partnership affairs in his account as administrator. He stated an account, showing that B had no interest in firm. This view was contested by heirs of B, and, on final account, auditor reported against A for $23,800. A excepted, on the ground that O. C. had no jurisdiction of partnership matters. Thirteen years had elapsed between A's first and final accounts.—Decree for heirs of B. After so long a time A could not question a jurisdiction he had himself invoked with consent of all. Brown's Appeal, 8 Nor. 139, Pa. (1879).

Orphans' Court will not try title to fund in its hands where claim rests on an unsettled partnership account. The administrator of B sold all the goods, stock, fixtures, &c., of B's business. A claimed

one-half of fund obtained as partner of B. The fact of partnership was denied.—Decree for B's administrator. The court can not try the question of partnership. If there was a firm, its accounts must be settled in another forum. Bentley's Est., 16 Phila. 263, Pa. (1883).

Orphan's Court can not enforce specific performance of a contract between partners in a firm transaction. B took title to land as trustee for C, who furnished cash consideration, agreed to share the profits, and convey a moiety after re-imbursing C his outlay. C assigned his interest to A, and B died. A asked O. C. for specific performance under Act 16 June, 1836, P. L. 792, which gives jurisdiction to compel conveyance if contract by deed, and Act 24 Feb., 1834, P. L. 75, giving mode of proceeding.—Dismissed. O. C. no jurisdiction if firm account involved. Walker's Appeal, 4 Pennypacker 452, Pa. (1884).

2. *Attachment of partner's interest in firm credit gives court no jurisdiction over foreign co-partners to enforce a settlement.* B recovered judgment against A in West Va., sued him upon the judgment in Ohio, and attached a debt due from C to A & Co. A, though a non-resident, appeared and demurred to the attachment.—Dissolved. The credit attached belonged to A & Co., and A's interest gives Ohio no jurisdiction to compel foreign co-partners to settle their accounts. Garnishee could not dissolve attachment on ground that he held no property of A. B entitled to prove A's property in C's hands, and then jurisdiction *in rem*, but court had obtained jurisdiction *in personam* by A's appearance. Myers v. Smith, 29 Ohio St. 120 (1876).

INDEX.

ABANDONMENT of business, ground for a dissolution. § 173 and n. 12.

ABUSE of legal process, by partner charges co-partner. § 139, n. 4, *v.* TORT.

ACCEPTING SERVICE.

Appearance by partner like; partner may not accept service for co-partner. § 119. Acceptance of service by partner in joint suit no objection, and judgment does not merge claim. § 83.

ACCOUNT.

The account is an epitome of partnership. It sums up and applies all its principles in order to adjust the transactions between the partners. The account is the only process which is co-extensive with the partnership business. § 206. Although it is the remedy for the settlement of all the transactions of the firm, yet it may be brought for any transactions which may be isolated from the general business, and which do not involve a dissolution of the firm. The isolation may result from the nature of the transaction or from the contract of the parties. § 159. The account gives every advantage that could be obtained by a cross-bill. § 206, n. 1. A partner cannot sue his co-partners for a firm transaction without an account. § 206, n. 2. The account being adapted to firm transactions, excludes transactions on individual account. § 214, n. 1 & 2. An account stated binds the partners, though unsigned. § 215, n. 1. A balance sheet is evidence against a partner who prepared it. § 215, n. 1.

The basis for the account is: 1, The firm property; 2, The partners' liability; 3, Good faith in the business. § 207. The partners enforce the contribution. § 207, n. 1. The partners' quotas must be ascertained for distribution. § 206, n. 1. The question of loan or contribution must be ascertained. If a lender took no security and made no bargain for repayment of principal and interest, a mortgage made afterwards to cover the loan and subsequent advances would indicate the lender's position. § 207, n. 2. The theory of the contribution determines how it will be considered in the adjustment. § 207, n. 2. The profits form part of the property, and are identified with it. § 207. A managing partner may in account be made to show why the business was not a success. His management

requires explanation, as profits was the object of the partnership. § 206, n. 4.

If the partner uses firm paper to pay his individual debt, co-partner's payment of half to release his separate estate entitles him to reimbursement. § 126, n. 1. *v.* Commercial Paper.

A breach of good faith, resulting in loss or damage to the firm or co-partner in his separate estate, is an item of charge against the wrong-doer and of credit to the injured partner. If dissolution is made by a partner before the period fixed, the co-partner may recover damages for the breach of contract, and they will be measured by the profits made during the preceding months of the partnership, and not mitigated by the plaintiff's profits made in a new business begun before the term expired. § 212, n. 3. Fraud in forming the partnership is ground to correct a settlement. § 212, n. 5. Competition in business. *v.* Good Faith.

The decree for account may be anticipated by a settlement or by submission to arbitration. § 214, n. 3. Partner cannot take away co-partner's discretion to submit by charging him with fraud, unless he makes out a *prima facie* case. § 215, n. 2. The settlement is interpreted according to the principle of the relation. Agreement to take debt out of surplus is not construed to be a release of the stock if no surplus. § 215, n. 3. The settlement is binding, and can not be rescinded if accepted by third persons. The allotment of a business to each partner is not enforced until owelty is paid. § 215, n. 3. Laches will bar the suit for a settlement. The Statute of Limitations would be an adequate bar. § 213, n. 1. After a settlement the Statute runs between the partners. § 213, n. 2. The period which will bar a partner's claim for an account is the ordinary limitation of six years. § 213, n. 3. The agreement to submit partnership differences to arbitration is not construed liberally to oust the jurisdiction of the courts to decree an account and appoint a receiver. The construction is in favor of jurisdiction by the courts, and the differences are referred to such as arise during the partnership, and do not extend to controversies arising out of the settlement upon dissolution. § 215, n. 3. The jurisdiction of the account depends on the domicils of the partners. The attachment of a partner's interest in a firm claim would not give jurisdiction over the firm, in order to enforce a settlement of its business for the benefit of the separate creditor. § 216, n. 2. Though if the parties were in the jurisdicion, the court might treat the attachment as a method to compel the partner to make a settlement of the firm accounts, in order to ascertain what, if anything, was coming to him which the creditor would be entitled to claim in satisfaction of his attachment. This seemed to be the Pennsylvania view if the attachment was mesne and not final process. The Orphans' Court has no jurisdiction over the partnership account, by reason of the deceased whose estate is before it for distribution being a partner, unless the co-partners consent to submit the account to adjudication. § 216, n. 1.

INDEX.

ACTION. *v.* PROCEDURE.

ACTS OF PARTNERSHIP. *v.* Holding Out. Evidence.

ADVANCES.

The privilege which a partner has, who advances money to his firm, or makes outlays on its account, is a lien on the firm assets, § 165, n. 1, which must be paid before the co-partners can take anything, § 165, n. 3, or the separate creditors can come upon the fund. The lien does not avail against firm creditors. § 201, n. 1 & 3. The lien is only of a partner upon the firm stock, and does not include an advance to a co-partner. The separate creditors of the co-partner are entitled to a preference in the distribution of his estate. § 165, n. 1; § 201, n. 4. As a co-proprietor, the advancer cannot be a lender to the firm, and his advance cannot be collected. The advance is assimilated to a loan, § 165, n. 4, which carries interest as incident to the debt, without an express agreement, only as an item in the account upon a dissolution. But interest will be collected, even from a stakeholder, pending an account between his co-partners, unless he proves readiness to pay on demand, and no employment of the money in the interval. § 297, n. 4. If the firm had no capital, the partner advancing it is entitled to recover interest. He would not forfeit his interest by mingling the advance with his own funds in bank, if no loss occurred by the deposit in his individual account. § 165, n. 4. The advancer's share of the loan is put at the risk of the business, and to the extent of this portion is contingent. It must remain in the business until a dissolution, and be included in the account. § 208. For this reason he may stipulate for any rate of interest, without committing usury. § 165, n. 2. The partner's lien for advances has a preference over the lien of the separate creditors. § 202, n. 3. Also on the land held by the partners as tenants in common, though for the firm, in N. J., and generally; but in Pa. the record title in the partners would give their separate creditors the preference. § 112, n. 6. If overdrafts, which are the converse of advances, are made without a settlement, interest would begin to run from dissolution, when, at least, accounts should have been settled. § 165, n. 3. In addition to the rights of a lender, the advancing partner is entitled to marshal the assets for his payment. A partner could get firm paper discounted to reimburse himself his advances. He would not be defrauding creditors, as he has precedence over them. § 184, n. 3. The purchaser of a partner's share can obtain his advances upon a settlement. § 206, n. 2. The liability to pay debts, unless assumed, does not entitle partner to reimbursement as for an advance. § 210, n. 1 & 2. But the amount of firm debts paid by him he may recover without interest. § 210, n. 3. A partner may recover the costs of litigation, but not the expenses of conducting the litigation, unless by agreement. § 210, n. 4. A surviving partner may recover compensation for carrying on the business for the deceased partner's estate; because they were not rendered for liquidation,

but for continuing the business for the deceased partner's estate. This is an exception to the rule which prohibits compensation to the surviving partner for his services. § 210, n. 4, *a*. Partner may recover payment of damages caused by co-partner's tort, or excess of authority, unless privy to it. § 210. Partner's lien for advances cuts out judgments against co-partner holding title. § 112, n. 6. A surviving partner has a lien for his advances. § 15, n. 2. *v.* Mining Partnership.

AGENCY.

The test of partnership, if the property element is excluded. This is an error, because the capacity is involved in and measured by property. The principal in a business or partnership is a proprietor. The principal apart from the business or partnership is not a partner. Agency the result, not cause, of partnership. Partner's title empowers him to intervene to protect firm property. § 103, n. 12. *v.* Property. Husband, wife's agent. Partner's implied agency measured by the business, agent's by the character of transaction. § 69, n. 9. Agency, unlike status, revocable. § 10. *v.* Status. *Cestuy que trust's* election not founded on agency. § 42. *v.* Trust Funds.

APPEARANCE.

Partner cannot employ attorney to appear for the firm. *v.* Partners. *v.* Accepting Service. Attorney officer of court, and may appear for any one. Only redress against attorney. Judgment would not be stayed without payment of costs. § 119, n. 1. In New York, opened to let defendant into a defence, but not avoided. § 119, n. 1, *c*.

APPORT. *v.* CONTRIBUTION.

APPORTIONMENT of Assets and Liabilities. *v.* CONTRIBUTION. *v.* DIVISION.

ARBITRATION.

Not construed to oust jurisdiction of courts. § 215, n. 3. *v.* Account. May anticipate account. § 212. *v.* Account. Partner cannot submit firm claim to arbitration, because a judgment on the award would bind co-partner's separate estate. § 120. If judgment restricted, as in N. Y., to firm assets, submission by partner valid. § 120, n. 1, *b*. Partner buying out co-partner can submit, because award would bind only him and the assets. Like a confessed judgment which binds only firm stock. § 120, n. 2.

AREA. § 8. *v.* SUBJECT-MATTER.

ARÉTIN. Title to Contribution. § 34, n. 1.

ARNTS, L. von Arnesburg, Civil Law indivisible contract. § 91, n. 3.

INDEX.

ASSETS.

In the adjustment of account between the firm and its members upon insolvency, the rule is, that nothing can be collected, either by the firm from its members or by a partner from the firm. But a single case in Pennsylvania permitted a set-off between the partners of their debts to the firm, and awarded the balance to the creditor partner's assignee. § 106, n. 7, *b*. Marshalling Assets. *v.* Marshalling. Partner's debt to firm, if incurred by fraud, may be collected. § 197, n. 2. *v.* Marshalling. Partner's debt to firm not an asset, and no set-off of debts between partners, because firm creditors paramount and firm collects both. § 202. As partners parties in all litigation, no partner can sue firm (i. e., self and co-partners) nor firm (i. e. self and co-partners) sue him. Both claims excluded as assets of joint and separate estates. If collected, assets (joint and separate) would depend on a balance of account. Distribution upon execution. *v.* Execution.

ASSIGNEE of a Partner. *v.* CHOICE of a Partner. Suit by. § 76, n. 3. *v.* PROCEDURE.

ASSIGNMENT.

Of firm claim to let assignee sue when firm filed no certificate. § 76, n. 17. *v.* Procedure. By partner of stock, unless for equivalent, does not exclude creditors from recourse to fund. If assignee agrees to pay debts, the agreement enures to the firm creditors, who may enforce application to firm debts. § 106, n. 2 & 5. The partner's transfer of his interest to his co-partner does not cut out separate creditors, if he is insolvent, unless for sufficient value. The joint tenant at the Common law could neither release nor surrender his estate so as to cut out creditors. The technical relation back to the creation of the estate, or merger of it in the reversion, was not permitted to defeat the claims against the joint tenant's interest. § 103, n. 2. Assignee of a partner interested only in liquidation. *v.* Execution. Partner may assign firm stock to avoid adverse sale if co-partner cannot be consulted. § 114. *v.* Powers. Assignment of mortgage in payment an executed contract which discharged firm. § 117. *v.* Powers. Partner may assign a judgment, but not guarantee its payment. § 117. *v.* Powers. For creditors. *v.* Powers. By firm to pay separate debts. *v.* Diversion of Stock. The assigment for creditors does not involve the delegation of a partner's capacity. The assignee becomes rather a trustee for the creditors than a substitute for the partner. In the function of applying the assets, he does not exceed the duties of the sheriff. The assignment is less than a confessed judgment. § 131. Assignment for creditors an agency for payment. § 59. The assignment of the whole stock would, *prima facie*, dissolve the firm, but the fact might be rebutted by evidence. If the partners mean to resume business after paying the debts, the assignment would not be a dissolution. Then a subsequent bankruptcy would stand, if a dissolution, no firm exists to be put into bankruptcy. § 103.

The preference made to a separate creditor in the assignment for firm creditors does not vitiate the assignment. The preference is void, and would be stricken out by a creditor's bill. § 170. n. 1. A *pro rata* distribution of the surplus among the separate creditors would not avoid a firm assignment for creditors, although the distribution would be a fraud on the separate creditors of the partner entitled to the larger share. § 170, n. 2. Purchaser of firm stock who agrees to pay the debts is not an assignee for creditors. § 148, n. 1. Neither retiring partner nor firm creditor has any standing until the margin of insolvency is reached. Then the exposure to the debts raises the equity to marshal the assets to discharge the liability. § 148, n. 2. The indemnity charges any subsequent purchaser of the assets. § 100, n. 9, *b*. The assignment of firm assets, with agreement to pay firm debts, does not enable firm creditors to elect assignee partner as his separate debtor. § 170, n. 4. Assignment of partner's share. *v.* Powers. Purchaser of partner's share cannot carry on business. § 206, n. 2. The sale must be of the partner's interest, for he has no separate property in any specific asset, or, if a particular piece of property is assigned, the sale must be subject to account, and cannot be separated from it. This is simply selling his interest, and he can never be restrained from selling out, although it might result in breaking up the business. § 171, n. 4. The partner's assignment of his share as security operates as a mortgage, which binds the assets when the partnership is established. § 172, n. 2. Assignee of a partner becomes a co-proprietor, and resembles a dormant partner. § 68. Surviving partner not an assignee, but original owner by joint title. § 121 & 100, n. 5. Partner can not sue as assignee of co-partner, although he represents firm. § 76, n. 3. *v.* Procedure.

ATTACHMENT. *v.* EXECUTION.

Attachment of partner's interest in a firm claim to compel a settlement not to acquire jurisdiction. § 216, n. 2. *v.* Account. Attachment for a partner's debt does not affect firm lands. § 10. Partner's power to sell does not give separate creditor right to attach firm stock. § 103, n. 3. *v.* Powers.

ATTORNEY.

Attorney taking half profits for fee not a partner. § 59, n. 2, *i*. Attorneys could recover a fee for services in a court in which one partner was not admitted to practice. The right to the fees belongs to the firm, and although the services were rendered by one partner, his co-partner would, in theory, render an equivalent in some other department of the business.

AUTHORITY. *v.* POWERS. § 160, § 163. *v.* PROCEDURE.

BAILMENT

At the Common law, property partook of the nature of bailment. § 4. *v.* Property. A bailee has no power to sell. § 4, n. 2. Bailment might be

substituted for partnership. The property might be bought by one, and held by another for manufacture, and they might share the profits of the transaction. § 67, and n. 11.

BANKRUPTCY.

Partner by estoppel put into. § 69, n. 22. Proof in, does not deprive judgment creditor of his priority. § 111, n. 5. v. Land. Separate liability for joint debts enforced in bankruptcy. § 79. v. Contract. Bankruptcy rule a makeshift of convenience. § 196. v. Marshalling. Repealed by inconsistent statute. § 204, n. 3. v. Marshalling. Bankruptcy proceedings originally discriminated joint from separate estates by the commissions. § 103. Double proof. § 205, n. 6. v. Marshalling. Bankruptcy rule protects only the separate estate. § 197. v. Marshalling. If no surplus after paying partner's separate debts, co-partner can enforce individual claim. § 198. v. Marshalling. Payment of firm debts would enable partner to enforce individual claim against co-partner. § 201, n. 2. v. Marshalling. Discharge in bankruptcy of innocent partner does not bar suit against him for co-partner's tort. § 149, n. 3. v. Tort.

BATES' Special Partnership. § 37, n. 2. Release by partner binds firm. § 117, n. 2, *a*.

BEGINNING Partnership. v. COMMENCEMENT of

BENEFICIAL ASSOCIATION. v. GAIN.

BENEFIT. v. GAIN.

BIBLE, The. v. § 37, n. *i*.

BIDDLE, Geo. W. A memorial address by, upon the judicial career of the late C. J. Sharswood. § 102, n. 2, *b*.

BILLS AND NOTES. v. COMMERCIAL PAPER.

BISSET, Andrew. Partnership land. § 109, n. 5.

BLACKBURN, Lord, Marshalling between firms with a common member. At Common law double claims. Bankrupt Acts restored the Common law rule. § 205, n. 1, 2, 4. Scotch plan of collecting debts by firm from members, the original English method. * 202, n. 1.

BLACKSTONE, regarded usury as a debt. § 66.

BONA FIDES. v. GOOD FAITH.

BORCHARDT. Commercial Codes. Contribution becomes property of the firm. § 30, n. 1. Equivalent for contribution upon dissolution. § 28, n. 1.

BORROWING. Limit of partner's power fixed by usage of business. § 123. v. Powers.

INDEX.

BRACTON. Inference of copyholds from emancipation. § 4, n. 1. *v.* Property.

BRADLEY, Mr. J. Argument that ursurpation of franchise equal to a charter. § 37, n. 1.

BRAMWELL, Lord. Account of limited liability. § 26, n. 4.

BRAVARD—VEYRIÈRES. Tontine not partnership. § 16 & n. 4.

BUILDING, Partnership in. § 11 & n. 2.

BUMP, Orlando F. Joint adjudication by modern practice includes distribution of separate estates. § 77, n. 3.

BUSINESS CONTRACT. *v.* CONTRACT.

BUYING AND SELLING did not make partnership in land. § 8 & n. 1.

BUYING.

Partner's Capacity for, *v.* Powers. Trade gave right to buy and sell. No Partnership in. The association for buying without selling, does not constitute a partnership. The Common law was familiar with joint purchases to hold. The purchase for division excludes the idea of making a joint profit; each purchaser realizes his profit separately in the enhancement of the price of his purpart. § 7, n. 1; § 49, n. 3. Only limit to partner's power to buy lies in the proportion which goods bear to the needs of the business. § 115. *v.* Powers.

CADWALLADER, J. Assignment by partners, unless for value, entitles creditors to reclaim stock. § 106, n. 2, *a.* Partner's renunciation of his equity would not affect creditors. § 106, n. 2, *b.* Joint creditors' privilege not dependent upon a technical lien. § 106, n. 5, *d.* Privilege follows the stock. § 106, n. 5, *f.*

CAIRNS, Lord. Marshalling assets between firm with a common member. Bankruptcy allows double proof. Argument when not allowed. § 205, n. 4, 6.; § 64, n. 3. Partners using trust funds become trustees *ex maleficio.* § 42, n. 2.

CALIFORNIA

Has changed Common law procedure, and allowed suit against partners in firm name. § 76. *v.* Procedure. California Code prohibts fictitious name, and requires certificate of publication. § 76. Release of partner and not of co-partners. § 90. *v.* Procedure.

CANONS OF DESCENT. *v.* DESCENT.

CAPACITY AS PARTNER.

Common law admits no capacities in an individual, § 164, though the common member seems to be acquiring capacities by different trades. § 164, n. 1. Partners cannot announce that they are acting in the capacity

of partners, and thus charge only the stock which might be devoted to the business. The Common law did not admit any limitation of liability, and charged the individual without reference to his assumed restriction to a special function. The suggestion of giving the partner a separate capacity arose through Feudal tradition, which accustomed lawyers to measure a man by his estate, and made it the legal factor in the transaction. Partner's capacity to buy, sell or pledge. *v.* Powers. Partners cannot deprive co-partner of authority, even by notice to third persons who are about to deal with him. § 133, n. 1. Insolvency does not incapacitate him to act as a partner. § 133, n. 2, 3. The partner's authority is incident to, and co-extensive with, the business. § 133, n. 4, 5, 6. Partner may re-deliver goods on return of firm notes. The merchandise satisfies the debt, though the insolvency of the firm prevents it from satisfying its other creditors. Partners can restrict their liabilities by contract between themselves. They cannot bind each other by contract, but not third persons. § 134.

CAR-TRUST, a partnership. § 16, n. 6.

CASE, of Pollion v. Secor, § 69, n. 1, explained, § 60, n. 6. *v.* Holding Out. Cox v. Hickman, assignment for creditors. § 59. Hart v. Kelly, not a decision. § 64, n. 3.

CASSAREGIS. Sharing profit and loss without partnership. § 51, n. *a.*

CELSUS. *Quadriga.* § 67, n. 7.

CERTIFICATE

Of publication, when required by statute, must be filed before suit, but firm may assign claim or sue for tort without certificate. § 76, n. 1. *v.* Procedure.

CHANGE OF PARTNERS.

The incoming partner is not liable for acts done before he entered the firm. He cannot ratify them, for they are not done in his name or by his authority. Carrying out previous contracts of the firm does not charge him on them, § 144, n. 2, but if the contract can be severed in interest and apportioned according to the consideration, that is, a new contract implied for the part performed since he joined, he will become liable. § 144, n. 1, 3, 4, 5. His contract with the partners does not enure to creditors. § 144, n. 6. They are the parties who must contract with him. § 144, n. 7. The theory of novation is being replaced by that of trust and consideration. By the consideration the incoming partner becomes an original debtor, and his contract is not within the Statute of Frauds, although his assignor remains liable for the debt. The fund received charges him with a trust for the creditors who can sue him in a direct action. § 145, § 150. The trust is barred by the Statute of Limitations. § 145. Charging as trustee the incoming partner who takes the assets and

agrees to pay the firm debts, results in imposing an ultimate liability upon his separate estate. This by novation could have been accomplished only by substituting the personal obligation of the incoming for the outgoing partner. § 150, n. 1. If the debts are scheduled, the effect of the assignee's contract to pay them is to make the specified debts liens upon the fund, and equity will enforce payment out of the assets in the assignee's hands. § 150. Novation remains, however, as the means to relieve a retiring partner. § 146, n. 1. Running contracts continue to bind the retiring partner. The contract charged the partner, and the fulfilment of it is not a new obligation created after his retirement. § 146. An exchange of partners is sufficient consideration for a release. § 146, n. 2. Taking security is ambiguous, either collateral or in satisfaction, and substitution must be proved. A note in the unchanged name of the firm does not release the retiring partner, unless the creditor knows of the change and means to substitute the new for the old obligation. § 146, n. 3. The retiring partner's liability for the outstanding debts is the foundation of his equity to prevent a diversion of the assets. § 147 & n. 1. The equitable lien is a term of the sale. He enforces the destination by joining a creditor's bill. § 147, n. 2. *v.* Marshalling. The creditors of the new and of the old firm come in upon the assets on equal terms. § 147, n. 3. A new partner is necessary to make a novation binding. The creditors had the several contracts of the old partners in the business contract of the firm. By the technical formula the joint was different from the several contract, and, as a substitute, furnished a consideration. § 149. Notice to creditors by retiring makes him surety of continuing partner in New York. The receipt of rent would be a substitution of the new firm, if the landlord knew of the change and accepted rent of the new firm, especially if the term had expired. § 149, n. 3.

CHOICE OF A PARTNER.

The choice of a partner is the right to select him. Consent is the tie, and without it there is no partnership. This choice relates, and should be confined, to the relation between the partners. It has been erroneously extended so as to affect third persons. They don't care what the partners agree to. Investing an assignee with a right to control the firm property would make him a partner towards third persons. If he becomes a co-proprietor, he is like a dormant partner. If the sub-partner is intended to be a partner, he becomes one in spite of the form. § 68. No choice of partners in a mining partnership. § 15. *v.* Mining Partnership.

CIVIL LAW PROCESS. § 77, n. 1. *v.* Procedure, CONTRACT, *v.* Contract. of SET-OFF. § 130, n. 8, 9, 12. *v.* Set-Off.

CLAIM. *v.* CONTRACT.

CLERK.

Clerk's knowledge of employer's acts and declarations imputed to principal. § 69, n. 16. *v.* Holding out. Not between partners. § 167, n. 4. Firm's guarantee of faithful performance by clerk. § 71, n. 1. *v.* Executor. He cannot create liabilities against the firm, but he may carry out contracts made by the firm. § 130, n. 10. May be employed by liquidating partner. § 178. *v.* Liquidation.

CLUB. § 16, n. 1. *v.* GAIN.

CODE, Napoleon. Adopted Felicius' definition of partnership. § 16, n. *d.* ratio of profits to contribution. § 36, n. 2.

COKE, Lord. Land not subject of partnership. § 8. Profits equal to property. § 57, n. 4.

CO. LITT. Statement that Law Merchant no part of Common law. § 11, b, n. *m.*

COLLYER, John. Release by partner. § 117, n. *n*, *a*. Accounts of isolated transactions during partnership. § 159, n. 1.

COMITY.

Special partnership recognized by. The recognition includes the immunity of special partners. The failure to meet the statutory requirements of record and cash payment would not forfeit the privilege, if not constituents of the partnership at the domicil. The law of the domicil also regulates the process against a special partnership, although the law of the forum is different. § 37, *a*.

COMMENCEMENT OF PARTNERSHIP.

The intention of the parties determines the commencement of the business. Partnership would not be frustrated if war intervened before actual commencement of the business by citizens of belligerent countries. It is not war which suspends the relation, but it is the interdiction of commerce, and, in the meantime, acts of business might establish a partnership. By performing the acts the parties show that they have waived preliminary conditions. But a partner could not begin and establish partnership by an act in excess of his authority. Thus the authority to endorse commercial paper did not justify the endorsement of forged paper, and bind co-partner, as a legitimate act of business. Though the contract of partnership was not acted on, one party could pledge his copartner's credit. The contract formed a partnership until rescinded, although not carried into effect, but abandoned. § 17.

COMMERCE. Interdiction of. § 17, n. 3. *v.* Commencement of Partnership.

COMMERCIAL CONTRACT. Nature and remedies for breach of. *v.* Contract. *v.* Procedure.

COMMERCIAL PAPER.

Joint payees of commereial paper at first held to be partners. The joinder on commercial paper by the owners was a joint act in trade. As long as the paper was used only as an instrument of trade, the joinder as payees was proof of partnership in the document. § 6. The cases have been explained thus: The acceptor was said to be estopped, because he had accepted the paper after it had been endorsed by only one payee. But the ruling was changed by the fact that commercial paper outgrew the limits of trade, and became a convenient instrument, which was used by persons not engaged in trade. Being no longer confined to trade, a joinder on commercial paper is not proof of a joint act in trade. Hence, a payee could not endorse for his co-payee. § 6.

Nothing but partnership creates implied power to bind by promissory note. § 49, n. 1. The authority of a partner is defined not by partnership principles, but by Commercial law. There is no authority implied between the firm and its members, but only between the firm and third persons. Any paper by the partner to his firm, or by the firm to a partner, should, on partnership principles, be notice of an accommodation, and give the holder notice. But the forms are disregarded in business, and the law has followed usage, and charges the firm without reference to the form of the paper. § 124, n. 6; § 126, n. 4. As no restriction can be imposed on the partner, and he can charge the firm by firm paper for his individual use, there is no limit to his power. § 126. No argument from power given by commercial paper. § 135. If a partner used the firm name for his separate debt, and the co-partner had to pay a moiety of the debt to release his separate estate from execution, he could recover payment from the partner. The payment would be under a duress sufficient to entitle him to reimbursement. § 126, n. 1. The acceptance by a partner of a draft upon his firm charges him as well as the firm, so that he has no additional credit to pledge. § 126, n. 2. Note charges partner held out. § 69, n. 18. *v.* Holding Out.

Partner may get firm paper discounted to repay himself his advances. § 184, n. 3. *v.* Advances. Partner may accept a draft on the firm in his individual name, § 124, n. 1, and a partner's note can be shown at the trial to be for a loan to the firm. § 124, n. 6. A partner can not be restricted in using commercial paper, because it is incident to business. § 124, n. 2. A partner's promise to give commercial paper would bind the firm. § 124, n. 3. Partners in different firms can exchange commercial paper for mutual accommodation. § 124, n. 4. If one partner makes and another endorses a note, the application of the proceeds would not charge the firm on the note, § 128, n. 3, but if the credit was given to the firm the loan could be recovered from it. § 124, n. 5. A partner cannot make accommodation paper in firm name. No one taking such paper,

with knowledge, can recover. § 125, n. 1. The endorser of such paper cannot retain pledge received for his endorsement. § 125, n. 2. Party to fraud in negotiating firm notes will not be compelled to recall them. The remedy is against the firm, which can recover at Common law. § 125, n. 6.

Anything which discloses to lender an individual transaction should put him on inquiry. § 125, n. 5. The change of individual to firm paper at suggestion of endorser would be notice, § 125, n. 3, or third person's note with firm endorsement in answer to demand for security for a personal loan. § 125, n. 4. If the partner makes a note payable to a stranger who endorses it, and then the partner's firm endorses it, the taker sees an accommodation endorsement by the firm of a partner's individual debt. § 127, n. 4. Notes of partner endorsed by firm and negotiated by him, are no notice of individual transaction. § 127, n. 1 & 2. A firm note made by a partner in two firms to and endorsed by himself and the second firm, is not notice that the paper was not for the second firm's benefit. § 126, n. 3. § 127, n. 5. Partner's exchange of firm notes for a stranger's notes, which partner endorsed to take up original firm notes, is binding. § 126, n. 5. Firm note endorsed by a stranger presumed a firm asset if partner holds it, unless endorser had negotiated it in the market. § 126, n. 6. Usage for single partner to keep bank account and give checks makes blank check to co-partner available for him to negotiate in firm business. § 127, n. 1. If the firm draws on a stranger, who accepts the draft, which is payable to the partner and endorsed by him, the taker holds the firm. § 127, n. 6.

Dissolution ends the power to use commercial paper, even for liquidation. § 178, n. 3, 4, 5. Except in Pennsylvania, liquidating partner no power to issue commercial paper. § 184, *v.* Liquidation. Partners charged on commercial paper though not parties to it. § 44, n. 8. *v.* Name. English statute makes parties signing bills and notes alone liable. This enactment alters the law, by excluding the parties in interest, who could always be sued. § 76. Analogy for commercial paper deceptive, because power exceptional. § 135. Firm creditors cannot set-off payment of partner's individual debt against *bona fide* holder of firm paper. § 167, n. 5 *a*. If firm note included a separate debt, payee can recover but only the amount due by the firm. § 167, n. 5. *c*. If partner gives firm paper for his individual debt, co-partner need not repudiate transaction. § 168, n. 1 & 2; § 169, n. 1. *v.* Tort. No implied power to bind firm by commercial paper in non-commercial partnerships. *v.* Trust Funds. Mining partner cannot bind firm by commercial paper. § 15, n. 4. *v.* Mining partnership. Partners liability on though not parties. § 44. *v.* Name. If in partner's individual name, question for jury whether firm or individual transaction. § 186, n. 6. *v.* Liquidation. Partnership must be established to justify commercial paper. § 49, n. 1. *v.* Powers.

COMMERCIAL PARTNERSHIP. *v.* TRADE.

COMMISSION on sales not evidence of partnership. § 63. *v.* Evidence. Commission on profits. § 60.

COMMON AGENT of Different Principals. § 69, n. 11. *v.* HOLDING OUT.

COMMON LAW PROCESS. *v.* PROCEDURE. *v.* CONTRACT.

COMMON MEMBER

Furnishes no basis for marshalling assets. § 205. *v.* Marshalling. By subrogation surviving escapes payment and enforces payment from deceased partner's estate. § 203. *v.* Marshalling. Litigation, when allowed between firms with a common member, results in limiting execution to joint assets. § 161, n. 7. Obstacle inherent, and not only in procedure. Equity compelled to put common member in plaintiff or defendant firm. § 163. Only basis a settlement of both firms. § 164. Seems to be acquiring capacities by different trades. § 164, n. 1. Like a Roman slave, who had no *caput*, not like Roman freeman. § 164, n. 5, 6, 7.

COMPANY, Distinction between, and Corporation. *v.* SPECIAL PARTNERSHIP.

COMPENSATION. Liquidating partner has no right to, § 186, § 188. Compensation for management by firm which used trust funds contributed by trustee partner. *v.* Trust Funds.

COMPETITION. Partner cannot compete with firm. § 151, § 212. *v.* Good Faith.

COMPOSITION. *v.* RELEASE.

CONDUCT, General, evidence of partnership. § 69, n. 4. *v.* Holding Out.

CONFESSED JUDGMENT. *v.* JUDGMENT.

CONNECTICUT has changed Common law process by statute, and made firm a party. § 76, n. 1. *v.* Procedure.

CONNECTING LINES. § 62, n. 1, *e.* *v.* EVIDENCE.

CONSENT.

A partner may be bound without his consent, although partnership arises from consent. The consent refers to his co-partners, and the contract by which he forms the relation with them. He is not bound to strangers by consent or on the partnership contract. That is foreign to them; they sue him for his act. The doing a joint act charges the actors as co-principals. If parties intend to act like partners to secure an end without being partners, they are liable as partners. The effect of their joining charges them in spite of the intention or agreement not to be partners. § 45. Effect of domicil on co-partner's authority. § 184, n. 3. *v.* Liquidation.

CONSIDERATION

Implied for services at request between members of a family. § 2, n. 2. *v.* Family Relation. Additional partner consideration for release of retiring partner. § 146, n. 2. The promise by continuing partner to pay the firm debts is not consideration for the release of the retiring partner. § 95. *v.* Contract. Validity of release depends not upon the seal, but upon the receipt of the consideration. § 117, n. 2. Title to land results to firm from payment of price. § 112, n. 7. *v.* Land. Denial of partner's authority puts holder to proof of consideration. § 184, n. 3. Consideration for contract of partnership. § 23. *v.* Partnership; supports indemnity to co-partner. § 49, n. 3, *a* & *b*.

CONSPIRACY. Agreement not to bid above limit for recruits. § 211. n. 2.

CONTINUING PARTNER.

v. Change of Partners. May sever contract. § 144, n. 3. *v.* Change of Partners. His liquidation may be the security for price of retiring partner's share. § 186. *v.* Liquidation. If insolvent, retiring partner or firm creditor may enforce agreement to pay debts. § 147, n. 2. *v.* Marshalling. Continuing may set-off debt of retiring partner. § 84, n. 3. *v.* Set-Off.

CONTRACT.

Construction of contract of partnership for court. § 21. *v.* Partnership. Contract binding until rescinded, although not acted upon. § 17, n. 1. *v.* Commencement.

Right to make contract result of power to sell, which is a constituent of trade. § 3. *v.* Powers. How does the law charge parties on a contract when they have made none? The law implies a contract in order to enforce the duty. The partners have joined in a transaction, and the law assumes they contracted to perform the act together, and then charges them for the breach of the implied contract, which has nothing to do with the partnership contract. § 46. This contract is imputed not only in joint acts, but is implied in all joint receipts, occupation, use or possession of property. § 47. The effect of implying a contract as the remedy for a tort. § 48, n. 2. *v.* Tort.

The contract which partners make in transacting business is joint in form but severable in fact. § 78. This appears in the execution. Also in equity and bankruptcy the personal liability is enforced, but the Common law process prevents the enforcement in the first instance. The Common law did not furnish a remedy for the commercial contract, or adapt one to the business engagement, but proceeded as if it was the old joint contract. § 79. Joint contract admitted of but one judgment, and unless plaintiff could effect service upon all, he lost his recourse against the non-served partners. § 81. *v.* Procedure. The commercial contract enforces payment from all the contractors. The ordinary contract, at the Civil law, apportions the liability among them, and that was the rule at the

Roman law, but the commercial contract, in all countries, is *in solido*. The joint contract gradually got severed. The wedge was inserted by Lord MANSFIELD. He made the defendant waive a joinder unless he pleaded in abatement. This ruling admitted several contracts, and if it had been carried out would have given several remedies. § 80. This change has been effected by statute in Colorada, Alabama, Kansas and Iowa. The defendant's right would have been protected by a plea of non-joinder. That would make a co-partner also subject to execution, and enforce contribution in advance. § 81. The effect of joint contract upon procedure. *v.* Procedure. The distinction between a joint and a joint and several contract, it was decided, has been obliterated; but co-obligees must join, and suit against two would not justify judgment against one on his individual contract. The joint and several contract is no better than the joint contract. The abstraction of a joint obligation, which is not made up of the individual obligations of the partners, is the fiction which produces the mischief. The judgment would be a merger of the contract, although the plaintiff elected to sue one. This fiction exists at the Civil law, and is fully discussed by German authors. The change was effected by converting this joint contract into the several contracts of the partners. Lord MANSFIELD'S allowance of the plea in abatement acknowledged a several liability of each partner to suit. § 92 The severance was carried forward by C. J. MARSHALL, who said that if the judgment merged the claim, the judgment must bind the co-partner. § 93. The modern procedure shows that the severance is complete, because a new and independent suit is brought against the other partners after judgment. The former method showed a joint cause co-extensive with the defendants; the declaration against any but the defendants served was bad. Now there is no bringing in of other defendants, but a new suit lies against them. That the joint contract is severed, appears from this: The relinquishment of the joint contract formerly served as consideration for a several contract, but now it does not. The plaintiff already has the separate contract in the joint contract, which is an aggregate of all the contracts of the partners. § 95. The business contract is simply an aggregate of the partners' contracts; the jointness is only a form like the firm, the real contracts are by the partners. § 96. This appears in set-off. A partner suing to enforce a separate claim is subject to a set-off of the firm debt, which is thus several, and corresponds to the claim. § 96, n. 1.

If the parties apportion the claim, they can enforce it at law. The law divides their liability, and will recognize their doing what it imposes as a duty. § 96, n. 2. A mining contract charges the retiring partner. § 146, n. 1. *v.* Change of Partners, or deceased Partner. § 175, n. 1. A contract severed and apportioned according to the consideration. § 144, n. 3, 4, 5. *v.* Change of Partners. Common law charged common member upon contracts of both firms. § 205. *v.* Marshalling. Tort erroneously assimilated to a contract. § 139, n. 6. *v.* Tort.

CONTRIBUTION.

The effect of a contribution is to show that the contributor is a proprietor of the firm stock, and a proprietor is a partner. § 4. The contribution need not consist of material property; it might consist of skill and services, if the co-partner accepted them as an equivalent. Nothing prevents the partners from waiving a contribution; but their waiver does not affect third persons who treat every partner as contributing, and on that account owning the firm stock. § 4. Loan for contribution. § 19. *v.* Loan. Partners might buy directly as a firm for their contributions. If the purchase was made on firm credit, without any intermediate and separate ownership, the firm would be liable for the price. If each purchase offered as a contribution is subject to acceptance by the co-partners, the seller could not hold the firm. The purchase, unless accepted for a contribution, would not become a contribution. § 19.

A partner contributes the use of his property during the partnership, but not the property, unless it is necessary for the business. This is shown in real estate, where it does not form the substance of the firm business. The title remains in the partner. This is generally the case with fixed capital. The reason why merchandise vests in the firm is because the use alone would be inconsistent with trade. Buying and selling involves ownership, as a loan involves title in the borrower. The transfer is inevitable for the partnership business and for third persons. Although not made for the partners *inter se*, yet the effect is a legal transfer of title. Hence, forming a partnership avoids a policy which prohibits a change of title. A partner cannot retain the title to his contribution. It was once so held, but the ruling is inconsistent with partnership. If the original stock did belong to the contributing partner, the stock which replaced it would belong to the firm on whose credit it was bought, and the seller would have no vendee's lien on the new stock. The firm to which the contribution belongs during the partnership bears the decrease and gets the increase in value of the contribution during that period. This is also the German and Austrian rule. The rule is extended to fixed capital which does not become firm property, if the addition cannot be separated from the original contribution. The improvement would be attributed to the firm which enhanced the property by its business or its funds. The partners' agreement, however, would change the rule and enable the contributing partner to withdraw his contribution and secure the enhancement for himself, unless the firm had made improvements with its funds, and he had not objected. Then the court would treat his acquiescence as a waiver of his individual claim. § 28. Although the use is contributed, and the property passes to the firm by the necessity of the business, yet the title will be held by the contributing partner between himself and his co-partner. The contribution becomes firm property only for the exigencies of the business. § 29. The inclination of the court is in favor of making the contribution firm property. As the leaning is to-

wards vesting the contribution in the firm, slight evidence will be sufficient to carry it to the firm. An ultimate share in the proceeds of a mine, if sold, carried the mine into the firm. § 30.

The English theory of contribution is that it becomes firm property out and out. If the contribution was lost, the property, being shared like the profits, would be lost by all the partners. Upon this theory one partner should not make up any part of his co-partner's loss of contribution. The loss would be borne by all as proprietors. The English, however, do not consistently adhere to the view which they have taken. The partners share the assets, not in proportion to their shares of the profits, but according to their contributions. By the Massachusetts theory, the contribution is a debt, and each partner must repay it, like any firm debt, in proportion to his share of the profits. If a partner is insolvent, or out of the jurisdiction, the solvent partners, or the partners amenable to process make up the insolvent or absent partner's quota of liability. But the debt theory is not carried out. There can be no debt during the partnership, for the lender cannot sue himself for its recovery. The Massachusetts courts make the contribution revert to the partner at the dissolution, though a lender has no right to take possession of the property which belongs to his debtor without legal process. The loan does not carry interest. § 31. The Massachusetts theory is adopted in some other States. In Georgia, the agreement of a partner upon dissolution to take the assets and pay the debts, charged him with liability for his contribution, which was ranked as a firm debt. In Illinois and Indiana, the partners were charged to make up a partial loss of contribution, according to their shares of the profits. The method of sharing the loss of contribution, suggested by Judge HOFFMAN, was this: Each partner loses his contribution which he risks in the business. If a partial loss, the distribution of loss is in proportion to the contribution. After the contributions are exhausted by debts, the loss is divided among the partners in proportion to their shares in the profits. New York did not adopt the division of loss according to contributions, but enforced the liability of each partner to pay the loss of contribution. An agreement might restore the correct method of sharing the loss, but, unless unequivocal, the courts will not let it supercede the established rule. An agreement to share the depreciation of stock like the profits, did not prevent the inference of sharing a loss of the stock in that proportion. The only State which carries out the debt theory consistently is Germany. The German code makes the contribution carry interest from the start. § 32. The original theory was that the property in the contribution remains the separate estate of the contributing partner, subject only to the temporary transfer to the firm during its continuance. It was owing to a curious oversight that this theory was not maintained. POTHIER, for some idiosyncrasy, did not adopt it, and the French codifiers followed him. The Germans followed the French Code. § 33. Pennsylvania is the only State which divides the loss of capital in proportion to the contributions. Judge SHARSWOOD is

entitled to the distinction of re-discovering, without historical aid, the nature of the contribution in a partnership. He apprehended at once, by legal instinct, the character of the contribution. In unearthing this fundamental principle, he exhibited a profound knowledge of the partnership relation. § 34. He showed equal insight in detecting the source of a partner's equity. § 102, n. 2. A partial loss of contribution is distributed in Pennsylvania according to the contributions. They, being separate property, are lost in whole or in part by the owners. The English do not show any confidence in either theory which they have adopted. A slight change by contract will induce the courts to recur to the division of the loss by the contributions. An agreement to divide the assets according to the partners' interest in them was sufficient to measure the loss by the contributions. Massachusetts disregards its debt theory with equal facility. The guarantee of profits for the first year relieved the partner guaranteed from all liability for his co-partner's contribution of $75,000. An agreement for an interest in the ship and cargo, invested the supercargo with title to the property contributed by his co-partner. § 35. The ratio of profits may not be fixed by agreement. Then the share of profits will not serve as the standard to measure the loss of contribution. But in the absence of contract, the law may divide the shares among the partners according to their number. This is the hard and fast rule of the German Code, and under it the sharing of the loss will include the contributions. The French code provides for the sharing of the profit and loss in default of agreement, according to the contributions. The English method does not regulate the subject by law, but leaves the fact for ascertainment by the jury, which finds what share each partner should have of the profits. This introduces the experts in each trade, and fixes the share by usage and custom. It is only in default of any evidence that the division by heads is adopted. § 36,

There is nothing peculiar about a special partner's contribution, except that it must be actually made. § 37. If property contributed by a partner was not owned by him, the owner could reclaim it, unless he authorized the partner to make use of the property. Then his use of it in the firm would make it his debt, and not the debt of his firm. § 38. *v.* Trust Funds. Contribution in services. § 54. *v.* Profits. Profits as increment of contribution, § 54, and ground to charge partaker as a partner. § 55. *v.* Profits. The correlation of profits and contribution is not inconsistent with the theory that the partnership has only the use of the contributions, for the use carries the ownership during the partnership. § 57. Contribution of deceased partner's estate. § 74. *v.* Executor. Contribution by infant partner and its recovery. § 137. *v.* Infant. Assets marshalled according to theory of contribution. § 207. The loss of contribution entitles partner to consider business a failure and dissolve. § 173 & n. 8. Contribution might be bought on firm credit. § 115. Services capitalized if accepted as a contribution. § 54. *v.* Profits.

CONVERSION

Of Assets. *v.* Torts. Conversion of stock by sheriff. *v.* Execution. Of Land. *v.* Land. Out and Out. *v.* Marshalling.

CONVEYANCE.

Firm not a party, but deed to partners trading as and mortgage by them thus trading sufficient. § 111, n. 2. *v.* Land. Joinder of partner in deed of conveyance. § 112, n. 18. Pennsylvania method. § 109, n. 7. *v.* Land.

COOK, Francis W. Advocate. Scotch practice. § 96, n. 3.

CO-OWNERSHIP.

Natural inference from law of tenure. § 67. Raises no inference of partnership. *v.* Evidence. *v.* Division a sale. *v.* Sale.

CO-PRINCIPALS.

Parties who deal as co-principals, though not in trade, may render themselves jointly liable. The joint purchase, use, or possession of property charges them for each other's acts, without reference to partnership. § 44. *v.* Consent. *v.* Contract.

CORPORATION.

Parties trading in corporate form are partners. The directors and officers are agents of the stock-holders, who are the principals. Anything done within the scope of the business charges them as partners. *De facto* corporation. *v.* That heading. *Ultra vires* contracts of. *v.* *Ultra Vires.* Acceptance by, of beneficial legislation. *v.* Legislation. Judicial discrimination in favor of corporations and against special partnership. Distinction between, and Company. *v.* Special Partnership.

COTTENHAM, L. C. Firm charged by tort of partner. § 140, n. 3.

CREDITORS.

v. Marshalling. *v.* Execution. Separate creditor acquires no title by transfer from debtor partner, because firm receives no consideration. § 110. Could not claim proceeds of land if account showed no balance in his debtor's favor. § 110. *v.* Land. Separate creditors protected by legal title, if vested in their debtor. § 113. *v.* Land. Creditor has a standing to control liquidating partner. § 189. *v.* Liquidation. Bill lies to enforce continuing partner's agreement with retiring partner to pay firm debts. § 147, n. 2. *v.* Marshalling. Creditors of new and old firm co-ordinated. § 147, n. 3. *v.* Marshalling. Partner creditor of co-partner for balance of account. § 201, n. 4. *v.* Marshalling. Creditors subrogated to retiring partner's right, if they renounce joint estate. § 200. *v.* Marshalling. Creditors have nothing to do with profits, term confined to partners. § 55.

CREDIT-THEORY. § 107. *v.* PREFERENCE.

CROPPER. § 12, n. 1. *v.* LANDLORD & TENANT.

CROPS, Title to. § 12. *v.* LANDLORD & TENANT.

DAMAGES.

Recoverable for breach of contract by dissolution before period fixed, measured by the profits made during the preceding months of the partnership, and not mitigated by plaintiff's profits made in a new business before the term expired. § 212, n. 3. Damages converted into a debt by assimilation of debt to contract. § 140, n. 3. *v.* Tort.

DAVIES, S. D. Receipt of merchandise ground of contract implied by law. § 44, n. 2.

DEATH

Of a partner dissolves partnership without notice. § 175, n. 1; § 173, n. 1. Death released deceased partner, and carried over claim against co-partner. *v.* Procedure. Equity gave relief only after legal remedies were exhausted. § 86. Action also carried over. § 87. Direct remedy against deceased partner's estate in Pennsylvania, § 88, and in England. § 88. n. 8. Death of partner introduces equality of distribution, and prevents any subsequent setoff which would result in a preference. § 130. n. 13, 14, 15 & 16. *v.* Set-Off.

DEBIT. Firm debt to partner cannot be collected in competition with creditors, because partner also a debtor. § 202, n. 2. *v.* Marshalling.

DECEASED PARTNER

Liable for firm debts. § 74, n. 1. *v.* Executor. His debt set-off against firm claim in suit by surviving partner, § 96, n. 1, for balance of firm debt to co-partner. § 106, n. 7, *b.* Deceased partner's estate liable for compensation to surviving partner who carries on business for it. § 210, n. 4, *a.* *v.* Advance. When estate liable only in equity, withdrawal prohibited. § 204. *v.* Marshalling. Deceased partner's debt set-off in suit by surviving partner. § 96, n. 1. *v.* Contract.

DECLARATIONS of Partnership. *v.* HOLDING OUT. *v.* EVIDENCE. Declaration in action against less than all. § 94, n. 1.

DECREASE of contribution during partnership. § 28. *v.* CONTRIBUTION.

DEED to or by firm. *v.* CONVEYANCE.

DE FACTO CORPORATION.

The members of a *de facto* corporation are not exempt from liability as partners on any legal ground. Claiming exemption does not confer it.

If self-incorporation is effected under general statutes, and the statutory requirements are not complied with, the organization is defective, and fails to create a corporation. The applicants remain partners. The argument advanced by MORAWETZ for the recognition of a *de facto* corporation was this: *Ultra vires* acts should charge the members of a legal corporation as partners, if the acts of a *de facto* corporation charged its members with partnership liability. The answer to this argument is twofold: 1, *Ultra vires* contracts do not exist; 2, As an *ultra vires* tort is not an excess of power, but an incident of the business, the wrong would not be authorized. If in excess of the power delegated, the tort *would* bind the tort-feasors. § 24. Illegal corporations favored by courts, and special partnership discountenanced. *v.* Special Partnership.

DEGRAY, Mr. Justice. Proprietor a partner. Erred in calling profits a fund for creditors. § 55 & n. 1.

DELECTUS Personae. § 68. *v.* CHOICE of a Partner.

DESCENT, Course of, changed in England, not in America, by conversion of land. § 109.

DESTINATION.

The doctrine is founded on the joint tenancy of the partners in the firm stock, and prevents any disposition, unless the firm is solvent or an equivalent was received for the assignment. The creditors stand in the partner's place, and enforce his right for the satisfaction of their claims. The assignee for creditors represents them. A partner who takes the assets and agrees to indemnify his retiring partner against them, charges himself separately, in addition to his joint obligation, so that the firm creditors become also his separate creditors. The firm stock, if assigned for a separate debt, remains subject to the execution of the joint creditors. § 107. Enforced by retiring partner. *v.* Change of Partners. Not foundation, though ultimate cause of firm creditors' right against joint assets. § 99. *v.* Marshalling Assets.

DISAGREEMENT of partners not a ground for dissolution, unless it amounts to exclusion. § 173 & n. 9.

DISPOSITION. *v.* SALE.

DISSOLUTION.

Dissolution occurs, as a matter of course, upon, 1, the death of a partner; 2, the marriage of a single woman, and, 3, the sale, voluntary or enforced, of a partner's interest. § 173, n. 1 & 2. The relation is suspended, 1, by the lunacy of a partner and, 2, by war. In other cases the court will dissolve the partnership by decree, for the following causes: 1, A failure of the undertaking; 2, the exclusion; 3, the insolvency; 4, the lunacy, of a partner; 5, the abandonment of the business. § 173 & n. 8–12.

Notice of dissolution must be given, except when caused by death, but no particular form of notice is required. § 175, n. 3 & 4. The notice varies, according to the parties to be notified. A single advertisement at the place where the business is conducted would be sufficient for new customers, who are bound by the simple announcement. § 176, n. 2. The old customers are entitled to notice, and it must be brought home to them. § 177, n. 1 & 2. The holder of firm paper is not an old customer, although in the habit of discounting it. § 177, n. 3. Customers crediting the nominal partner must be notified of his retirement. The other firm customers could not hold him. § 175, n. 4 & 5.

In effect, dissolution revokes the partner's agency. As he can bind his co-partners until dissolution, it must be proved. § 178, n. 1 & 2. When established, the power to use commercial paper ceases, except for liquidation. § 178, n. 3, 4 & 5. He cannot acknowledge or revive by part-payment a debt barred by Statute of Limitations. § 178, n. 6 & 7. The dissolution severs the joint title into several titles, but the division must be completed in fact. § 179. n. 1. Damages may be recovered for a dissolution in violation of the contract. § 212, n. 3. *v.* Account. *v.* Distribution. *v.* Marshalling. Partner's absolute disposition of his share a dissolution. § 171, n. 2.

DISTRIBUTION.

v. Marshalling. Depends upon the property rights of the partners, and they can be ascertained only by the theory of contribution which obtains. The profits are an increment. The partners' quotas and the character of the advance are preliminaries. § 207. *v.* Account.

DIVERSION OF STOCK.

A partner's separate debt is no consideration for assignment by an insolvent firm. The firm can use its stock only to meet its own liabilities. A preference for special creditors would be void, but it would not avoid the assignment for creditors. The permission of an assignment to separate creditors in the proportion of the partners' shares is according to the New York theory of a tenancy in common. § 106, n. 9, *b*. The assignee for creditors could set aside the disposition as a fraud upon the creditors. The retiring partner's equity prevents the continuing partner's diversion of assets. § 147, n. 1. *v.* Change of Partners. Using firm assets for separate account. *v.* Torts. Diversion of joint to separate estate. *v.* Marshalling. Assets diverted to payment of partner's separate debt may be recovered by assignee in bankruptcy. § 192, n. 3. *v.* Marshalling. Partners may consent to appropriation. § 192, n. 3, *a*.

DIVISION by partners of claims or debts anticipates the law, and is enforced. § 96, n. 2; § 178, n. 5.

DOE, C. J.

Partnership agency. Partners co-principals. § 44, n. 1; § 58. Made partnership question of fact, not of law. Ignored that partnership is a conclusion of law from the facts. § 54, n. 3. Admits that without property as basis of partnership, the profits indicate nothing. § 54, n. 4. Profits not a fund for creditors. § 55, n. 2. Sharing in double sense, § 58, n. 2, by creditor confounded without sharing by a proprietor. § 58, n. 3.

DORMANT PARTNER.

As co-plaintiff or co-defendant. § 54, n. 1; § 76 & n. 3; § 77, n. 3. v. Procedure. The commercial type of undisclosed principal. § 26. At the Common law, non-joinder of dormant partner an unconscious election to release him. § 76. v. Procedure. Enactment of rule that parties in interest should join, compels joinder of dormant partner, which is inconsistent with the nature of the relation. § 76, n. 13. His not being joined released him, although he kept plaintiff from knowing of his existence. § 84. v. Procedure. No dormant partner at the Civil law. § 51. Superceded by special partner. § 3. v. Special Partnership.

DOUBLE PROOF. Restored in bankruptcy. § 205 & n. 6. Against trustee-partner and against firm. § 48, n. 3.

DOWER.

Land held for firm not subject to dower of title-holder's widow. § 208, n. 7. Attaches to partner's interest in firm land upon re-conversion, § 109, v. Land. No dower out of firm land. § 112, n. 13, 14. v. Land. In Pennsylvania, widow cut out by lien of a decedent's debts. § 112, n. 15. In New York, husband a tenant in common, and widow with both legal and equitable lien, has a preference over creditors. § 112, n. 16. v. Land.

DUAL POSITION of partner. § 99, § 100, § 116.

DURANTON. Contribution measure of profits. § 36. Profits by Civil law necessary to contribution. § 37, n. 3.

DURATION OF PARTNERSHIP.

Partnership, strictly speaking, cannot outlast a partner's death, because a change of partners necessarily creates a new relation. But the business is continued, and that is spoken of as a continuance of the firm. The introduction or loss of a member changes the liability imposed by law. A guarantee for a clerk's faithful performance could not be enforced by executor, though testator directed him to continue business. § 71.

DURESS. Liability for partner's separate debt makes payment under duress. § 167, n. 8, *a*.

DUVERGIER'S construction of the pearl case. § 63.

EDDIS, Arthur Clement. Doctrine of ex parte Waring. § 106, n. 8, *c*.

ELDON, Lord. Survivorship in partnership limited to legal title, and not extended to beneficial. § 100, n. 2.

ELECTION,

Unconscious, to release unknown partner by not joining him as a party. § 77, n. 3. *v.* Procedure. Equity put creditor of common member to his election. § 205. *v.* Marshalling. *Cestuy que trust's* election to follow funds or take interest. § 42. *v.* Trust Funds.

ELLENBOROUGH, Lord. Power to buy corresponds to power to sell firm stock. § 115, n. 1.

ENGLISH

Theory and practice in reference to contribution. § 31; § 35 n. 1. *v.* Contribution. In default of evidence, share of profit and loss an inference of fact. § 36 & n. 5. Process. § 77 & n. 2; § 96.

EQUITABLE LIEN.

The control of the stock by means of an equitable lien would be sufficient for the protection of creditors. But, historically, the creditors' rights are legal, not equitable, and arise from the joint estate. § 103. *v.* Marshalling.

EQUITY.

Partner's. The partner's equity is the right to have the firm assets applied to the payment of the firm debts. The equity was thought to be founded upon the property interest of the partner. When he lost his interest in the property, either by voluntary or adverse sale, the equity was held to pass with the interest. Judge SHARSWOOD held that the equity was founded upon the partner's liability. The unlimited liability of a partner is a construction of law, not an obligation intended by the partners, and equity relieved the partner against the outstanding liability. § 102. *v.* Change of Partners. The destination by partners of stock to the business fixed its character and created a joint estate, which was pledged to firm creditors, and could not be converted to any other purpose without the consent of the firm creditors. The partners, if insolvent, could not sell, except for value. Each partner has the right to prevent any diversion, and this right is called his equity, because the remedy is generally equitable. The right is to protect his separate estate, which might be called upon to make up the loss caused by a diversion. The firm creditors avail themselves of his equity to enforce the distribution among themselves as the beneficiaries. As the object of the equity is to protect the partner's separate estate, his legal liability for the firm debts in his separate capacity is the foundation of this right. § 106, n. 5 & 7, also *v.* Executor. If the equity was founded upon his property right, parting with his

interest would leave him exposed to unlimited liability for the firm debts, and at the same time deprive him of the control over the stock which should be marshalled for his relief. A nominal partner who has no property interest, would, by this theory, have no equity. § 106, n. 4. But if held out as a partner, the firm creditors would be preferred to the individual creditors of the contributing partner. As the partner held out would be entitled to marshal the assets for his relief, the firm creditors would, through his right, be entitled to the assets. § 69, n. 19. The right cannot be relinquished or waived, for the creditors are parties to the arrangement, and the bar, like an alienation, would be a withdrawal and a fraud upon them. § 106. Retiring partner's continued liability for the firm debts is the foundation of his equity. § 147 & n. 1. *v.* Change of Partners. *v.* Marshalling. Equity's restriction of creditor to one of two funds the origin and extent of marshalling joint and separate assets. *v.* Marshalling. Firm creditors do not depend on the partner's equity for recourse to firm stock. They have an independent right, § 194, n. 3. *v.* Marshalling. Equity will not open judgment to bring in after-discovered dormant partner. § 85. *v.* Procedure. Set-off is a medium of equity. § 130, n. 4, 5, 7.

ESTATE.

The estate prevents separate creditors from seizing their debtor-partner's share. His dominion as owner is controlled by his co-proprietors, whose rights prevent any withdrawal, and exclude the separate creditors, who stand in the partner's shoes. § 100. The joint estate gives a status. *v.* Status. The joint estate survived upon a partner's death. The property, as well as the claims, survived to the co-partner, and did not go to the deceased partner's representatives. § 99 & n. 1; § 103. The surviving partner did not take as a new acquisition, but by original title, which related back to the beginning of the estate. This was recognized in reference to real estate, as soon as the liability for debts attached to real estate at the Common law. Source of creditor's control of firm stock. § 103. *v.* Equitable Lien. Estate personified. § 103.

ESTOPPEL, Partner by. *v.* HOLDING OUT.

EVIDENCE.

Of Partnership. Proprietorship shows the title of a principal in the business. *v.* Property. Profits show ownership. *v.* Profits. The capacity of a principal, if the only clue to partnership, would make the relation a question of intention or a state of mind. The legal effect of the distinction between a principal who is not, and a principal who is, a proprietor is important. If the proprietor is a partner, the evidence of his proprietorship establishes his position by law; if proprietorship does not prove him to be a partner, the law does not regulate his status, but it is a question of fact for the jury. The *prima facies*, which infers a partnership from exerting

the right to take profits, proves that the law determines his standing. The *prima facies* stand until it is proved that the right was not exerted by virtue of a title to the profits, but by appointment from the proprietor. § 54. On the theory of principal and agent, partnership is a question of the partners' secret intention. *v.* Property. With intention as the test, the effect would be that partnership, which has become an establishment of credit, would be reduced again to the standard of a bargain, or of a private arrangement between the partners, and the public benefit of an institute of credit would be destroyed. § 57. The inference of property from sharing the profits is not peculiar to partnership; it is the general rule of law, and applies in partnership as elsewhere. The confusion arose from the term "sharing:" The sharing by a proprietor and the sharing by a non-proprietor. The first was partnership, the second was the opposite of partnership. If sharing is the inducement to partnership, it must involve the contribution to a joint business for the purpose of making them. The means (a partnership) must be willed as well as the result desired. § 58. The law was preserved by denying the effect of a partnership unless the sharing was by a proprietor. The discrimination was effected by exceptions which were classified, and which amounted simply to the re-establishment of the original effect of sharing the profits as proprietor. The exceptions were: 1st, Payment of wages or salary out of profits; 2d, Payment of employee, or extension of hiring to any subordinate; 3d, Managing, or carrying on, business for the principal, if not also for the manager. The exceptions are verified by Criminal law, which sustains indictment against member of any class, although he claims to be a partner. Cox v. Hickman does not establish any new position. The creditors carry on the business for the debtor after reimbursing their debts; if they carry it on for their own benefit, they become partners. This is the distinction between an assignment for creditors and a sale to them by the debtor. § 59. The foundation of the distinction taken between sharing profits and receiving a sum equal to a share of profits is the proprietorship of a partner. The position of a claimant was distinctly expressed by disavowing a right to the profits, and by presenting a claim against the proprietor for an allowance by him of a sum corresponding to a given share of profits. This form of statement was abused, by using it as a pretext to disguise the real position of the proprietor, who thus escaped liability. The pretence is not sanctioned by law. The court will investigate and find out the real nature of the arrangement, and if a proprietary title exists to the profits, no phrases will change the fact. § 60. The effect of sharing both profit and loss was said to prove a partnership, without any doubt. But sharing the loss is conclusive of partnership only upon the principle that a proprietor is a partner. If not necessarily a proprietor, the agreement of principals might be to share the loss and yet keep the business independent. They might share the losses and yet not be liable for the misconduct of the principal, who failed to pay money received for the transaction, but misappropriated it. The other principals would not be liable for the price. § 61. The courts never con-

sidered gross profits as evidence of partnership, because the proceeds represent the merchandise sold, and, if divided, give each party a purpart. They hold the product as they held the merchandise. This view is correct, for the gross profits do not identify the participants with the business. The captain who received 2-3 difference, or advance, of price for coal between price at the mines and at the market, would not be a partner with the owner of the boat and colliery. The owner pays his own expenses, and the captain includes his in the 2-3 enhancement. The cost might exceed the increase in price, or there might be no increase. Then the captain would not share profits. If the cost of transportation just equaled the 2-3 enhancement, the captain would get no profits, while the owner would get his share in full. The fact that sharing gross returns is held not to make a partner verifies proprietorship as the test of partnership, because the stipulation for sharing gross returns if by a non-proprietor, would include profits, and bargaining for an equivalent out of capital, although no profits were made, should make one all the more a partner if profit-sharing, though by a non-proprietor, were the test of partnership. But if only by a proprietor, then there would be no sharing, unless profits were made. Connecting lines are considered as independent, unless the proprietors share the expenses of the entire route. That would unite them in interest in the transportation, and charge each for the other. § 62. If there was no common expense, they would be independent. A commission on sales is interpreted in the same way. The commission discloses no identity of interest. The broker might sell at his principal's loss. The pearl case of ULPIAN was a commission to sell at a limit. The agent and owner were not partners, because agent not co-owner, or would have been reimbursed his skill, services and expenses by a share in the pearls. At Common law, both would be liable, but would not be partners, because they did not share the expenses. § 63. A lender is not a partner, although he takes profits instead of interest for his loan. A loan is the opposite of an interest in the property. The lender gives up his title, and looks to the debtor for the return of an equivalent amount. The partner retains his title. The effect of the statutes, which authorize a loan without making the lender a partner, is to declare the law, not to change it. The clue to determine the difference between a loan and a partnership is the control over the money. If relinquished to the borrower, it is a loan; if retained by the alleged lender, it is a partnership. The statutes which postpone the lender, who stipulates for a share of the profits, create a deferred loan. The privilege is granted on the condition of a postponement in case of a competition with other creditors. A loan can be made to a particular fund without any personal debtor. This has been allowed in other branches of law, and extended to partnership. The creditor renounces his right to hold the partner, and looks only to the profits for payment. In the Hindu Rajah's case the original transaction was a loan, and the creditor sequestrated the debtor's property, as if by execution. The amount of interest or profits does not make the lender a partner. The

amount indicates the desperation of the borrower rather than the intention of the capitalist to become a partner. A stipulation for both interest and profits would not charge the capitalist. The profits might be additional compensation for the use of money, and if no control was exerted over it, would not necessarily charge the capitalist. The lender might, under some circumstances, control the property. The control might be for his protection, and be a security for the loan. A single transaction which could mislead no third persons, because completed by the one operation, might thus be carried through by the creditor. A creditor might guarantee the capital for a business and take profits without becoming a partner, although he acted as a trustee in the distribution of the fund. § 64. The stipulation for interest equal to 25 per cent. of profits, or profits equal to 25 per cent. of interest, would not be usurious. The interest or profit itself is contingent upon earning profits. If no profits were made, nothing would be recoverable, and this risk of loss is equalized by the excess of the legal rate. § 65. *v.* also § 66, n. 6.

A usurious contract would prevent the creditor from being a partner. If a lender, he is not a proprietor. Taking profits in addition to, or in excess of, interest does not charge the recipient as a partner, unless he is a proprietor. This does not apply to holding out. Holding out is independent of any arrangement between the parties. The risk of liability to third persons would not justify a contract for interest in excess of the legal rate. The loan is not contingent upon the success or failure of the business. The debtor also gives his personal liability; (if he did not, there would be no usury. § 64, n. *a*; § 64, n. *c*). The risk of liability to third persons does not arise from sharing profits, unless by a proprietor, and if it arises from holding out, that is independent of the contract. § 66.

The inference is against a partnership if effect can be given to the facts without establishing a partnership. The reason of this construction is the reluctance to impose the unlimited liability of a partner, unless it cannot be avoided. Co-ownership excludes a partnership, because holding or tenure is the Common law theory of property, and is not superceded, except by trade necessity. This extends to other property than land. It was applied to ships, and extended to any fixed capital. To convert such capital into firm assets requires something more than using it. The parties must show their intention to convert it into firm property. The Roman law did not make this distinction. There the contract regulated the question. The parties might sue co-owners, and not partners, if they so stipulated. They made up a team, but retained the ownership of their respective horses, because they contracted to *sell* in partnership. Inference of sale. *v.* Sale. Of bailment, *v.* Bailment. Of factorship. *v.* Factorship. Of a gift, *v.* Gift. § 67.

Managing business, or general conduct as partner, evidence of partnership. *v.* Holding Out. Motives for partnership, as well as contract, incompetent on the issue of holding out. *v.* Holding out. Any act or admission by one that he is a principal in the business is competent to

charge him. The fact of holding out is for the jury. Whether a late partner becomes a partner again by reason of his wife's receiving a deceased partner's share was for the jury, who determined whether he acted for himself or as agent of his wife. There is no order in which partners must be proved. The contract between them implies that an admission by one should be a declaration against the others; but it is not given any effect until, and unless, followed up by acts and admissions by the others. The admission, however, of partnership between A & B by A in B's presence would charge B if he did not deny the statement. § 69. Plaintiff cannot compel co-partner not sued to testify as adverse. He is not an adverse party, or an adverse beneficiary of the suit. He is liable in a different suit. § 95, n. 4.

Surviving partner not disqualified by joinder of deceased's representatives. § 87, n. 3. *v.* Procedure. Husband of wife, a partner, disqualified by interest. *v.* Married Woman. Evidence of firm title to real estate. *v.* Land. Issue of partnership. *v.* Liability. Surviving partner not an assignee of deceased partner, so as to exclude testimony of opposite party as to transactions with deceased. § 121. *Contra*, in Pennsylvania. Evidence that judgment confessed to defraud creditors puts judgment-creditor to proof of *bona fides*. § 122, n. 9. *v.* Powers.

EXCEPTIONS

To the rule that sharing the profits is a test, prove the rule. The principle of the exceptions is that sharing by a non-proprietor is not partnership. The sharing profits must be by a proprietor. § 59.

EXCLUSION of partner from the business is a ground for dissolution. § 173 & n. 9.

EXECUTED CONTRACT. § 117. *v.* ASSIGNMENT.

EXECUTION.

The Common law execution takes the partner's interest, and the possession under the levy is referred to the title. Therefore a sale of the firm title would not pass it without a joint levy, even though the sheriff held a joint writ and thought a second seizure of the stock already seized under the separate writ unnecessary. The sheriff cannot seize the partner's share, but he can seize the stock in order to sell the partner's interest in it. The execution (a *fi. fa.*) required a tangible thing for it to operate upon, and unless something could be seized, nothing could be sold. The requirement of the writ being satisfied, the sheriff must not disturb or remove the stock, and can sell only the partner's interest in the stock. The purchaser acquires no right to co-possession, but merely a claim for an account, to ascertain the balance, if any, coming to the partner. § 104, n. 5 & 6. A separate execution entitles the purchaser only to the debtor's interest after all the firm debts are paid. His right must be defined by an ac-

ocunt. The Common law at first directed an account, but subsequently relinquished the ascertainment of the interest to Equity. § 103. By the Chancery practice, a sale could not be made until the defendant's interest was ascertained. § 103, n. 5. The sheriff seizes the stock for the purpose of making an inventory, but becomes a trespasser if he removes the property. He sells the partner's interest in the goods. A special partner has an interest, though it was thought not to be tangible, because he had renounced his control over the firm stock. § 104, *v.* Special partnership. A joint execution, at any time before a sale, intercepts the title. § 106, n. 8. The sheriff's practice of selling on all the writs in his hands, compelled the court to decide how the proceeds would have been raised and distributed had the sheriff done his duty. § 106, n. 7. If the sale is lumped on separate executions, the distribution is made according to the shares of the respective partners. § 106, n. 8, *f.* The proper course, in Pennsylvania, would have been to hold the fund raised by a sale of the firm stock on a joint execution for the general body of creditors. This is the established course of practice where the court must make a *pro rata* distribution of assets. The sale under an execution might reasonably be treated as an admission of insolvency, and justify the court in impounding the funds. There is no excuse for handing them over to the separate creditors without exacting proof that no firm debts exist. § 106, n. 8, *d* & *b.* The separate creditor could be enjoined from selling, if the assets would not realize more than sufficient to pay the firm debts. § 108, n. 8, *c.* The mistake of letting a separate execution seize and sell any part of the stock has been corrected in Pennsylvania, by turning to account a statute passed to sell the intangible assets of a firm which a *fi. fa.* could not seize. § 106, n. *g.* The confusion arising from the sheriff's seizure of firm stock for separate as well as joint claims, is obviated by the use made of the Act 8 April, 1873, P. L. 65. A special *fi. fa.* issues to sell a partner's interest without levying on the firm stock. If two *fi. fas.*, the first in Common law, the second in statutory form, the second will take precedence. The sheriff is not bound to execute the first, and if he does, it is only in subordination to the second. If neither is in the statutory form, then the writ which made the money will take it, although execution had been levied under an earlier writ, no lien being acquired by the earlier form. § 168, n. *f*, *g*, *h* & *i.* The reason why the purchaser of a partner's interest does not step into his shoes and become entitled to co-possession with the other partners, is that the sale dissolves the partnership, and the purchaser is interested only in the liquidation which the partners are entitled to make, unless they are shown to be unfit. If the sheriff levies on firm stock, and sells a partner's interest on a separate execution, the co-partner would have no claim to recover in trover, as nothing passed but the partner's interest, which was liable to execution; unless the sheriff delivered possession of the firm stock, then, by the true theory, the co-partner could recover for the conversion of the firm property, but by New York law he could recover only for his half as a tenant in common. The equity to control

a partner's share for firm purposes is not equivalent to a joint title over the firm stock. § 105, n. 9–10. Separate execution creates no lien upon partner's share. *v.* Lien. An attachment could not be laid upon the firm stock for a claim against a partner. The attachment would forbid to the firm the use of its stock, and amount to an exclusion until the controversy was ended, though sustained in New York, on the ground that the sheriff could seize the stock and sell the partner's interest, which would be a moiety. This is according to the theory of a tenancy in common, or holding by several titles with joint possession, which would be severed by execution, and the purchaser vested with the defendant's title and possession. § 104, n. 4. Tenancy in common makes execution sever joint title. *v.* Property. Partner's executing firm judgment, if an abuse of legal process, charges co-partner. § 139, n. 4. *v.* Tort.

The stock must be subject to execution at the instance of the firm creditors, and no private agreement can withdraw it from them, especially where replaced by sale and re-purchase. § 106, n. 8, *j* & *k*. The firm, when insolvent, could no more confess judgment for a partner's separate debt than for a stranger's. Much less would an agreement to appropriate firm assets to the payment of a separate debt give it precedence over a firm debt. § 106, n, 9, *a*. Firm stock sold on separate execution can be recovered by all the partners. § 167, n. 5, *b*.

EXECUTOR.

Under direction of the will, an executor or, under articles, an administrator, becomes a partner. He becomes liable for all the debts incurred during his administration. Equity, however, cannot enforce the articles, and compel the representative to become a partner. He may renounce. Then the surviving partner would continue the business, without any substitute for the deceased partner. § 72. The effect of letting an executor, or administrator, take the deceased partner's place, is that the deceased partner's estate becomes a contribution, made by the beneficiaries, who thus become special partners by inheritance. § 74. In New York and Maryland the executor, or administrator, who acts under the direction of the testator, or under articles, is exonerated from liability, § 72, but elsewhere the general rule is that the executor, or administrator, incurs personal and unlimited liability as a partner. He represents the deceased, and is the only one who can control the destination of the assets. He cannot qualify his liability. If the direction, or agreement, imposes the duty, he would commit a breach of trust if he did not act; yet he need not administer, for he can renounce. The moment he does administer, liability attaches. § 73. If the executor, or administrator, becomes a partner, this may relieve the deceased partner's estate. It enables him to limit his contribution to part of his estate. His representative could not contribute any other part of the deceased partner's estate. This would be a breach of trust, and the beneficiaries might reclaim the funds. The representative will not be reimbursed for his loss incurred on behalf of the

deceased partner. The contribution is the limit of the deceased partner's liability, even if he acts under testamentary direction, or the articles would oblige him to act. If the representative allotted part of the contribution to a beneficiary, he could not charge the recipient for a loss which he was subsequently compelled to pay. The allotment is a withdrawal. Executor's creditors can be subrogated to his rights against deceased partner's estate. To the extent of deceased's liability, i. e., for the portion of his estate contributed, the representative's creditors may come upon the deceased partner's estate. If creditor is prevented by default from access to deceased partner's contribution, executor's creditors are affected by his exclusion. They cannot assert his equity. The set-off practically extinguishes his claim. The creditor of the executor is a creditor of the deceased partner, and, as such, may claim administration on his estate. § 74. The representative's position is ascertained like that of any partner. The natural inference is that he leaves the estate in the firm as a loan or investment, but if he contradicts this inference he will be charged. § 75 (§ 73, n. 1,). The representative can escape any liability, and yet continue the business, by entering into a special partnership and making the deceased partner's estate his contribution, § 75. Executor enforces partner's equity, now that deceased partner's estate is liable for firm debts. § 106, n. 6 & 7. Executor of deceased may be joined in suit with surviving partner. § 88.

EXEMPTION, not allowed out of firm property. § 103.

FACTORSHIP.

A factorship might exclude a partnership. The consignees might answer for the solvency of their vendees, and thus bear all the losses of the business. The consignors, by releasing half the loss, do but relinquish a right in favor of the consignees, who are thereby exonerated from full liability. The favor shown the consignees in this exemption, and in fitting up their store, is not evidence of partnership. § 67 & n. 12.

FAILURE, a ground for dissolution. § 173 & n. 8. *v.* Contribution.

FAMILY RELATION.

Though the family relation rebuts the presumption of a consideration for services rendered at request, and partnership is now a contract founded on consideration, yet its original character clings to the relation, which grew up in the middle ages as a family affair, and a consideration is implied for a partnership between members of a family as much as if they were strangers. § 2 & n. 2.

FARMING in Partnership. § 12. *v.* SUBJECT-MATTER.

FELICIUS. Definition of partnership. § 16, n. *d*.

FEUDAL theory of property injected into partnership, § 3, *v.* **Partnership.** and measured partner's capacity by his property. § 99, § 100.

FICTITIOUS name, use of, though prohibited, don't prevent recovery, unless credit acquired by it. *v.* Procedure. *v.* Name.

FI. FA., Kinds and what leviable under. *v.* EXECUTION.

FIRM

Not a party, except in States which have changed Common law by statute. § 76. *v.* Procedure. Different firms, if composed of same individuals, treated as one, no matter how far apart, and a general lien covers aggregate stock. § 164, n. 3.

FIRM CREDITOR.

A general creditor may enjoin a separate execution creditor from seizing firm assets. His equity gives him a lien, or interest, to protect the assets. § 106, n. 5. It was so held in New Jersey at first, but this ruling was superceded, and his right made to depend on a legal lien, which does not exist without an execution upon the assets. § 106, n. 5, *e* & *c*. The joint creditors exclude the separate creditors, and enforce the partner's equity. § 106, n. 5, *d*.

FIXED Capital does not become firm property. § 25. *v.* Contribution. § 67. *v.* Co-Ownership.

FITTING, Dr. Hermann. Civil law indivisible contract. § 91, n. 3.

FOREIGN JUDGMENT. *v.* JUDGMENT.

FORMATION of Partnership, Fraud in, ground for correcting settlement. § 212, n. 5. *v.* Account.

FRATERNITY, A, or Brotherhood, is not a partnership at the Common law. § 16.

FRAUD.

v. Statute of Frauds. No diverting firm assets to separate use. *v.* Torts. In formation of partnership, ground to open statement. § 212, n. 5. *v.* Account. Partner to fraud in negotiating firm paper. § 125, n. 6.

FRENCH

Fiction of partnership as a corporation. § 100, n. 2 & *a*; § 101. *v.* Status. No joint estate for firm, fiction of personality a makeshift, privilege of joint creditors unfounded, analogy of *peculium* groundless, and credit to stock because no person. § 164, n. 7. § 101, n. 3. Firm creditors no privilege, and distribution should be *pro rata* among joint and separate creditors. § 100, n. 3.

FRENCH PROCESS.

v. Procedure. By French law a civil partnership may be for any benefit; a commercial partnership, for gain. § 16. Contribution firm property. § 33, n. 1. *v.* Contribution.

FÜSSEL, Dr. Fred. Fransc. Distinction between corporation and company. § 37, n. *d.*

GAIN.

It is not every benefit which is sufficient to serve as the object of a partnership. It must be gain. This is because partnership came into the Common law through trade, which has gain for its object. At the Civil law, any benefit is sufficient, e. g., a park for recreation. But this being a kind of partnership derived by tradition from the Roman law, is discriminated from the commercial partnership, which is regulated by the commercial codes, and which resembles our trade partnership. A masonic lodge is not a partnership, but a social or beneficial association. If money is accumulated by a club, the members do not become partners by reason of the joint fund. It is an incident, not a controlling element, of the association. An association for mutual protection, or mutual insurance, is not a partnership. The purpose of the association is not gain, but security against loss. Every association for gain, which is not a corporation, is a partnership. On this ground a car-trust is held to be a partnership. § 16.

GENERAL conduct as a partner. § 69, n. 4.

GEORGIA adopts the Massachusetts debt-theory of the contribution. § 32. *v.* Contribution.

GERMAN LAW,

In reference to enhancement or decrease in value of contribution during partnership. § 28. *v.* Contribution. Carried out theory of contribution as a debt. § 32. *v.* Contribution. Of joint estate. § 29. *v. Status.* German Code. § 30, n. 8, 9. *v.* Set-Off. Profit and loss divided, in absence of agreement, by heads. German Commercial Code. § 36. Process. § 77, n. 1, *a.*

GIBSON,

Judge, accounted for partnership as an anomaly tolerated as an exception to principle, and only as an indulgence to trade. Partnership nothing but a contract. If the firm creditors excluded the separate creditors from the joint estate, he thought the separate creditors thus deprived of a right should exclude the joint creditors from the separate estates. § 102. The partner's equity a property right. § 102, n. 2; § 106. Partner's authority to appear, or employ attorney, like his accepting service. § 119, n. 2. Cannot submit to arbitration. § 120, n. 1, *a.*

GIFT.

The transaction might be a gift, instead of a partnership. The motive, ordinarily, would not be considered, but where the parties with the one who acted for the donees knew of the intention, it might be given effect. § 67.

GLÜCK.

The purpose classified partnership. § 1, n. 3. Services capitalized for contribution. § 57, n. 2. The nature of a partner's contribution. § 33, n. 1.

GOLDSCHMIDT, Dr. L. Buying and selling is the type of trade. § 7 n. 5.

GOOD FAITH.

The utmost good faith was originally exacted of the partners in their dealings with each other, on account of the intimate relation of kindred. At the present day, property identifies the partners in interest, and limits the application of the maxim. In reference to property, a partner must make a clean breast of his knowledge. § 151, n. 1. The property interest he acquires belongs to his co-partners, § 151, n. 2, whether he competes with the firm business, § 151, n. 3, uses the firm property, § 151, n. 4, or his position in the firm, § 151, n. 5, to secure a separate gain. But engaging in a different business is not a breach of the relation, though it may be of the articles, and furnish ground for an injunction, or a dissolution. § 151, n. 6; § 212, n. 2. A partner cannot transact business of the same kind apart from the firm, without sharing the profits of the independent business with his co-partners. If secretly done, and in competition with the firm, the partner will be held a trustee for his co-partners. The partner cannot make a profit in his secret and independent business which does not enure to the firm. § 131, n. 3. A settlement would be opened to make the competing partner account. § 212, n. 3. The credit of the firm cannot be used by him, without converting the benefit derived from its use to the co-partners. He cannot make separate contracts after a joint one by the firm. He cannot deal with the firm, because his interest will be adverse, to make more for himself as one party to the bargain than as one of the firm, or of the other party. He cannot use the advantage given him by the firm to make a separate transaction for his individual benefit. § 151, n. 4, 5; § 212, n. 8. He cannot buy property used by the firm, or renew leases without being a trustee for his co-partner. § 212, n. 2, 7, 9. He can, however, deal with his firm at arm's length, and, on the footing of a stranger, by an open course of transactions, which show a full knowledge and concurrence by both parties to an independent business carried on apart from the firm business, though involving direct dealings with the firm. The loss or injury resulting from the breach of good faith is an item of the account. § 212. *v.* Account. If partners brokers, and sale impossible, one may buy for himself. § 51, n. 2. Part-

ners in mining partnership deal at arm's length as to individual titles. § 15, n. 4. *v.* Mining Partnership.

GOOD-WILL.

Item of account. § 209. The good-will is an asset, the product of the partners' joint labor. § 209. The professional reputation is not part of the good-will, and does not pass by the sale of it. § 209, n. 1, *a*. The partner who has sold the good-will may compete with the firm, if he does not use the name. He will be restrained from using the name. § 209, n. 1, *b*. The good-will carries a trade-mark, though it is the name of the selling partner. § 209, n. 1, *c*. If good-will unsold, both partners retain the right to use the trade mark. § 209, n. 1, *d*. Neither partner can appropriate the good-will, and it will be sold for joint account. § 209, n. 2. If partners disagree, they will be made to bid against each other for the good-will. § 209, n. 3. Continuing partner must account for value of good-will. § 209, n. 2.

GORDON, J., shows that present practice justifies joining executor of deceased with surviving partner. § 88, n. 5 & 6.

GOULD, Tracy. Account lies for isolated transaction during partnership. § 159, n. 1.

GROSS PROFITS, Sharing. § 62. *v.* EVIDENCE.

GROSS RETURNS, Sharing. § 62. *v.* EVIDENCE.

GOW. Explanation of partner's liability for his contribution. § 20, n. 1.

GREEN, WM. Partner's power to employ attorney. § 119, n. 1.

GUARANTEE

By firm ends with death of a partner. § 72, n. 1. *v.* Duration of Partnership. A partner cannot charge his firm for the debt of a third person, or of his co-partner. The firm note for one partner's debt made by another would not bind the firm. It would be a guarantee, and, as such, must be made by all the partners. § 129. The firm might be compelled either to pay a partner's debt or be broken up, but the choice of going out of business is left. § 129. A partner in selling a judgment could not guarantee its payment. The guarantee would be void, though the assignment would be valid. § 129, n. 4.

HAHN, Dr. Friederich von. German process. § 77, n. 1, *a*; § 130, n. 2, 4, 8, *c*. *v.* Set-Off.

HAMILTON,

G. F., Esq. § 41, n. 4. *v.* Trust Funds. Mathematical demonstration of partner's liability for trust funds contributed by trustee-partner. § 42, n. 4.

HAMMOND, Anthony. The test of joinder is an interest in the contract. § 44, n. 1. Liability of joint contractors, § 44, n. 1, of tort-feasors. § 47, n. 1.

HARE, Judge J. I. Clarke. The joint liability of the Common law. § 44, n. 1. Creditor's possession of two funds basis of marshalling firm assets. § 102, n. 3.

HEIR of deceased partner must convey to purchaser from firm. § 110, n. 3. *v.* Land.

HINDU RAJAH'S case. § 64, n. 3, *b*. *v.* EVIDENCE.

HISTORY OF PARTNERSHIP.

Partnership grew up at the Roman law. At first, the *familia* was a partnership. This accounts for *societas omnium bonorum*, and for the doctrine of the strictest good faith in the relation. The relation of patron and client introduced the voluntary element, and led to the distinction between *communitas* and *societas*. Farming the public revenues led to the trade partnership, the only kind which has survived. § 1. Partnership continued during the middle ages, and trade was carried on generally by the members of a family, like the Rothchilds at the present day. In a predatory period the nearness of kin re-established the confidence which existed in partnership among the Romans. § 2.

HOFFMAN, Judge, took the correct view of the contribution. § 32 & n. 1; § 33, n. 1; § 34, n. 1. *v.* Contribution.

HOLDING OUT.

There are three ways for holding out: 1, By the party's direct authority; 2, by his consent; 3, by his knowledge that he is held out, and his failure to prohibit the holding out. His liability does not vary in these cases. It has been said so, but there can be no different measurement of damages for a man's consent, or for his negligence, because the liability arises from the injury to a person misled by the party charged. Holding out is representation of membership. A party who parted with nothing because of his reliance upon the holding out, suffered no injury from it, and hence has no title to compensation. Managing the business, or acting as a partner, is not strictly a holding out. Holding out is where the party takes no part and has no interest in the business. The manager is held liable, on the ground that he performs the functions of a partner, and will be held by his express acts, or by his general conduct. He must notify parties dealing with him of his subordinate employment, in order to be exonerated. General conduct as a partner would not charge the party, unless the third person contracted with knowledge of and in reliance upon the course of conduct. The representation must be to the plaintiff. Evidence of conduct is competent, but it must be known and relied upon by plaintiff. If not, he cannot avail himself of the acts indicative of partnership. They can be explained and

shown to be mistakes. One charged as partner could not give evidence that his contract was for management of the business, and that the firm was insolvent, in answer to his alleged admission of partnership. The contract between him and the partners was foreign to third persons, and his motives to make, or not to make, it are excluded with the contract. The unlikelihood of his making the contract is part of the issue of partnership between the partners under the contract, and that is foreign to third persons. The contract of partnership is excluded, because it is a secret which creditors cannot use in order to charge the partners. It is generally upon a failure to prove partnership that the creditors resort to the liability without partnership *inter se*. Having frustrated the creditors by withholding articles, the partners should not be able to defeat them again by producing the articles. The exclusion should be mutual; if the partners can withhold, the creditors should exclude. If the contract of partnership, and the inducements to it are excluded, the defendants could not introduce their books in order to show the relation in fact. They are incompetent for the same reason. The question is independent of and paramount to the relation in fact. The acts, or representations, of the defendant have misled the plaintiff, and it is too late to explain the conduct. Moreover, the prior explanation should have been made to the plaintiff. The explanation by arrangement between the partners does not reach him. The case of Pollion v. Secor may be explained by charging a man for his name in the firm designation. Everyone dealing with the firm relies upon a partner behind the name, and, upon finding him, holds him without anything more. The fact of holding out is proved by any act once done and accepted by the defendant. Judgment paid by defendant for a note, like one upon which plaintiff sues, is evidence sufficient to charge defendant. The promise to become a partner would charge the promissor. The representation for the future would be equal to a representation in the present. The difference between the holding out as to a partner and as to an agent is only as to the extent of the agency. The partner's liability is defined and limited by the business. The agent's would vary according to the variety of his transactions. If there is no individual name in the firm designation, all are liable who trade under the common designation. This is established by evidence. The credit would be given to all who thus traded when ascertained. The name covers and charges the parties using it. The effect of employing a common agent is that his business becomes the business of each employer, and charges them jointly for his transactions. If one held out notifies the party holding him out to desist, that is not sufficient to exonerate him from liability. The notice to the party holding out would imply giving him authority to continue the use of the name. The reliance would be put on the party holding the other out. The notice must be direct to the third persons. Reputation of partnership is not sufficient to charge one. Acts, admissions and declarations are representations to the plaintiff, who relies on them. He cannot rely on reports. Nor if partnership were es-

tablished could its scope be defined by reputation. The reputation could not enlarge, any more than create, a partnership. If admitted as a ground to charge, it would also be competent to discharge a defendant. If the plaintiff relied on reputation, and the defendant proved a dissolution equally circulated, the plaintiff would be met by his own kind of evidence. The defendant's knowledge of the reputation and declarations, and his failure to deny them, would be competent evidence of partnership against him. A clerk's knowledge of acts and declarations would charge his employer, who put the clerk in his place, and relied upon him. Holding out may anticipate partnership. The party might promise for the future and conditionally, but the plaintiff would rely upon his promise, and consider the condition waived, or disregard it. The condition is a private matter between the partners, which might be waived by them. A note would charge a partner held out, as well as the partners in fact. A partner by estoppel acquires the right to marshal the firm assets (also § 103, n. 4). He is liable for the firm debts, and the liability entitles him to see that the assets are applied to relieve him from the liability. A married woman, where competent to be a partner, is allowed, on this ground, to marshal the assets. The right to marshal the assets enures to her creditors. The creditors are entitled, although subrogation would not be available. Firm had a mortgage to secure a note, partner retired, and mortgaged property taken. Holder obtained judgment against all, and asked to be subrogated to continuing partner's place to get the property. Difference of parties the objection. But allowed to enforce right of all against the property. Defendant may insist that partner by holding out shall be co-plaintiff. The defendant might have a set-off which would be available only against all the partners, that is, the partner by holding out might have made the contract for himself and the other partners, and the defendant would have to hold the firm through the partner by estoppel. A partner by estoppel may be put into bankruptcy. This was denied, because all the creditors would hold him liable when he is liable only to those who knew and credited him. But this position is not sound, for Equity can marshal the assets. The nominal partner can be sued with the partners in fact. In England it is held that he cannot. The joint contract was not entered into by him. He stands apart, and must be sued alone, or, at least, not with a new partner, because he is unconnected with him. This is making the partnership contract the measure of a partner's liability, whereas the relation *inter se* is foreign to the question. It is not a fact that no cases can be found which permit the joinder of partners by estoppel with the partners in fact. The practice in America is certainly to join all. § 69. Joinder of nominal partner as co-plaintiff. *v.* Procedure. Admission by co-partners don't bind partner held out. § 146, n. 3.

HOLT, Lord. Partner's right to buy. § 5, n. 1.

HUNTER, Dr. W. A. Civil law indivisible contract. § 91, n. 3.

HÜRLEMANN,

Johannes. Cantonsprocurator. View of partner's title to firm property, of French notion of partnership as a corporation. § 101, n. 3. *v. Status.* Credit to peculium because slave or son incurred no liability. § 164 & n. 7.

HUSBAND, wife's agent. *v.* EVIDENCE.

HUTCHINSON, R. Account preliminary to sale on execution. § 103, n. 6, *a.*

Ihering, von. By contribution partner becomes disinterested, and works for co-partner. § 56, n. *a.*

ILLEGAL BUSINESS

Excluded from account. *v.* Account. No account lies for unlawful transactions. A partnership for a lottery would not be recognized by comity. The business would constitute a nuisance. § 211, n. 2. If part of business illegal, as trading in contraband merchandise, an account would not lie for the legal part. § 211, n. 1. A partner cannot compel an account of gains made by competition with illegal business. The illegality is a defence to the bill. § 211, n. 2. The investment of proceeds does not purge the transaction of its unlawful character. *Contra,* § 211, n. 3. Partners agreeing not to bid more than a given price for recruits not a conspiracy to control price, or illegal. § 211, n. 2. Partner's contract for options in grain does not charge co-partner, though firm business. § 139, n. 3. *v.* Torts.

ILLINOIS apportions liability for partial loss of contribution by the share of profits. § 32. *v.* Contribution.

IMPROVEMENTS to real estate by the firm. § 110, n. 6. *v.* Land. § 28. *v.* Contribution.

INCOMING PARTNER. *v.* Change of Partners. Cannot ratify. § 144, n. 2, 7. *v.* Ratification.

INCORPORATION.

Carrying on business jointly until incorporation charges the parties as partners, though the United States Supreme Court held that the membership might be only a qualification of an incorporator.

INCREASE of contribution during partnership. § 28. *v.* Contribution.

INDEPENDENT name of partner the firm designation. *v.* Name.

INDIANA makes the share of profits the measure of liability for a partial loss of contribution. § 32. *v.* Contribution.

INDUSTRY, Partnership in. § 7. *v.* MANUFACTURING.

INFANT

As co-plaintiff. § 76. *v.* Procedure. The continuance of the business after majority is a ratification of all firm transactions during infancy, § 136, n. 1, in analogy to the principle which charges infant for price of property retained after majority. § 136, n. 2. Analogy not perfect, because no physical property which might be handed over to firm creditor; but infant retains his position as partner and co-proprietor of business, which is the product of the contracts made during minority. Infant's failure to dissolve, and notify creditors of dissolution, also charges him for subsequent contracts of the firm. § 136, n. 3. Infant may reclaim his contribution, though not his deposit made a price of admission, against his copartner, § 137, but not indemnity, for he retains co-ownership of the property, and its loss results from his own act. When he reclaims contribution, he devests his co-partners. § 136, n. 4. If assets equalled infant's contribution, he could take them in competition with creditors. § 136. Infant's position as partner determined entirely by his property rights. The firm acquires no right by the partnership contract, and infant is not bound by the business contracts of the firm. The cases which charge him proceed on the theory that he invests his co-partners with title and is bound by his act. But his deed is not less voidable than his promise. § 137, n. 2, 3.

INSOLVENCY.

Proper method of distribution on execution if. *v.* Execution. Ground for dissolution. § 173, n. 1, *a*. Of firm makes payment of separate debt a fraud on firm creditors. § 167, n. 7, *a*; § 103, n. 4. *v.* Tort.

INSTITOR. § 101, n. 3. *v. STATUS.* § 191. *v.* MARSHALLING.

INSURANCE, Mutual. *v.* Gain. By partner covers stock, unless limited to his share. § 103, n. 10, 11.

INTENTION

Not equivalent to contract. § 23. Without property as a qualification, the secret intention of the parties would be the only guide to a partnership. *v.* Property. Intention sufficient now to make land firm assets. § 109, n. 56; § 112, n. 1. *v.* Land.

INTEREST.

Amount or rate for loan. *v.* Evidence. On advances. *v.* Advances. Excess of when not usurious. § 165, n. 2. *v.* Advances. On contribution. § 32. *v.* Contribution. Measured by profits not usurious. § 65; § 64, n. 3, *b*. In addition to profits. *v.* Evidence.

IOWA

Code makes firm a party. § 76, n. 1. *v.* Procedure. Prevents judgment against one partner being a bar to recovery from the others. § 82. *v.* Procedure.

ISSUE of partnership. § 44. *v.* LIABILITY.

ISSUE of partnership as to creditors excludes evidence of partnership contract and motives of parties. § 69, n. 5. *v.* Holding out.

JAMES, Lord Justice. Considered trustee-partner's use of trust funds as a loan to the firm. § 40, n. 2.

JOINDER.

The only joinder recognized by the Common law, was joint ownership and joint possession. Neither owner nor possessor could alien or mortgage his co-tenant's share, for only the possession or title was in common. § 5. Joinder in suit enforced by the technical joint contract. § 81. Intermediate joint business until incorporation. *v.* Incorporation. Legal excuses for non-joinder. *v.* Parties. Joinder of surviving and executor of deceased partner presents no difficulty. § 88.

JOINT AND SEVERAL CONTRACT, not an improvement of the joint contract. § 91.

JOINT CONTRACT,

A fiction, which frustrates the process. § 81. *v.* Procedure. Independent principals cannot be sued together, because no joint contract. § 63.

JOINT CREDITORS.

Preference derived from joint estate. *v.* Property. Right to assets. *v.* Firm Creditors. Preference. *v.* Joint Tenancy.

JOINT DEBTORS. Partners become by dissolution. § 178.

JOINT ESTATE.

v. Property. Cause of partner's capacity and firm creditor's right to the stock. § 194, n. 4, 5. *v.* Marshalling. Legal basis of joint creditors' priority. § 99; § 107. *v.* Preference.

JOINT PURCHASE.

If purchasers agree to pay by quotas, they are not jointly liable. The purchases are separate, and each is liable only for his part. A joint purchase charges each purchaser for the whole price, which is apportioned among them, subsequently, by contribution, or, if any are insolvent, among the solvent purchasers. If one purchaser gave the note of himself and co-purchaser for the price, his co-purchaser is not liable on the note The authority is limited to payment, and even postponement by commercial paper exceeds the authority. A promise, though less than payment, is not implied. § 49.

JOINT TENANCY, adapted to commercial uses. § 99. *v.* Property.

JUDGMENT.

If against firm, limited in first instance to joint assets. § 77. *v.* Procedure. By Civil law process enlarged so as to bind partners, unless they have personal defences, but by English law releases partners not served. *v.* Procedure. Judgment against one merges cause against several. § 77; don't bind partner's ultimate share of firm land, because it goes to him as new acquisition. § 109. *v.* Land. Separate judgment don't bind firm land. § 110, n. 5. Judgment against the firm binds its land and that of the separate partners from date of entry. § 111, n. 6, 7, 8 & 9. *v.* Land. In other States than Pennsylvania, judgment against a partner binds only his interest in land after firm debts are paid. § 111, n. 10. Except against *bona fide* purchasers, land is marshalled for firm creditors. § 111, n. 15. *v.* Land. Judgment against title-holder is not a lien against firm creditors. § 112, n. 6. Notice of firm title sufficient for purchaser or mortgagee. § 112, n. 10, 11, 12. Judgment against separate partner holding title, cut out by co-partner's lien for advances. § 112, n. 6. Partner cannot confess judgment against co-partners. They can have it stricken off against them, § 122, n. 2, but execution takes firm assets. § 122, n. 1, 2. Character of judgment, i. e., joint or separate, fixed by the claim. § 121, n. 4. If judgment limited to firm assets, as in New York and Louisiana, partner may confess judgment. § 122, n. 5. *v.* Powers. Evidence that judgment was confessed to defraud creditors, puts judgment-creditor to proof of *bona fides*. § 122, n. 9. *v.* Powers. Judgment in process modeled on Civil law process, limited in first instance to firm assets. § 76, n. 1. If special partner a party, judgment would bind his separate estate. § 76, n. 14. Foreign assimilated to domestic judgment. § 84. *v.* Procedure. Equity will not open judgment to let plaintiff bring in dormant partner. § 85. *v.* Procedure. At Common law, on death of partner, *sci. fa.* would not lie on the judgment against his representatives, although survivor insolvent. Acts were passed to rectify this process and bring them in. § 89. *v.* Procedure. Severing judgment severed cause of action, and gave independent right against each partner. § 90. *v.* Procedure. Partner executing judgment, if abuse of legal process, charges co-partner. § 139, n. 4. *v.* Tort. Credit of firm claim on judgment against partner don't bar firm's recovery. § 167, n. 4. *a.* The character of the judgment is ascertained by the claim; if separate, the judgment is separate; if joint, the judgment is joint. § 95. Merger of claim by. *v.* Contract. At first, death of co-judgment-debtor apportioned lien on land. § 103. Partner may assign, but not guarantee payment of, judgment. § 129, n. 4.

JUDICATURE, ACT and

JUDICIAL ORDERS, adopting Civil law process. *v.* Procedure.

JURY.

Partnership for jury, unless by contract in writing. § 21. *v.* Partnership. Whether husband became partner by wife's share, or her agent, for jury. § 69, n. 17.

JUS SEPERATIONIS. § 164; § 101, n. 3.

KANSAS

Joins surviving and executors of deceased partner in action. § 88. *v.* Procedure. Release of one, and not of other, partner. § 90. *v.* Procedure.

KELLER. Dr. F. L. Civil law indivisible contract. § 91, n. 3.

KENTUCKY charged deceased judgment-debtor's estate. § 89. *v.* Procedure.

KUNTZE, Dr. Emil. Theory of joint estate in German law. § 101, n. 2. *v. Status.*

LACHES deprives partner of right to demand appointment of receiver. § 182. *v.* Receiver.

LADD, J. Contract implied by law as a substitute for duty. § 46, n. 1.

LAND.

Land was not merchandise, and not the subject-matter of partnership. The intention which united the act of buying with the act of selling could not convert land into an article of traffic. The buying and selling remained two distinct acts, unconnected, in spite of the intention to fuse them, by reason of the ponderability of land. § 8 & n. 1. Oral partnership to deal in land. § 10. *v.* Statute of Frauds. When title is put in one or both partners, evidence is competent to prove the equity of the firm, subject to the separate claims of the title-holder. § 11, n. 1. Originally, mutual covenants were required, in order to make land an article of merchandise, and trading in it a partnership. Now the law gives effect to the purpose of the partners, no matter how their intention is manifested, but does not change the natural character of the land, unless the parties disclose such an intention. § 13. Land as contribution. *v.* Contribution. If land is conveyed to a firm, the title vests as personal property. Trade converts the land into merchandise, and makes it an article of traffic. A stipulation was originally required to convert land into firm assets, and mutual covenants were made in the partnership articles. Without a contract, the land would be held in common, and each partner could sue his co-partner for his share of the price realized by its sale. § 109, n. 5; § 112, n. 1. Subsequently the purpose of the partners became sufficient, without any agreement. The right of the firm now depends upon intention, and evidence of intention is competent to establish the firm title. § 109, n. 5. The partners taking land for a firm debt would establish a firm ownership. Taking title by the partners might be intended as a separation, and a holding as tenants in common, but taking the land in satisfaction of a firm debt would disprove a withdrawal, because the title was acquired in the transaction of firm business. § 109, n. 6. The fiction of a con-

version, like that of an equitable lien, is unnecessary. The firm has the control of the land for its purposes, no matter how it acquired title. § 109. The fiction was forced in England, and made to change the land into personalty, not only for the partnership, but altogether. The change shifted the property from the heir to the personal representatives upon the expiration of the partnership. The conversion being uncalled for after the partnership was over, a re-action took place against the arbitrary interference with the laws of descent. In America, no such alteration of the canons of descent has been attempted. § 109, n. 6. The statement that land becomes personal property, means that the title is controlled as a firm asset, but the incidents of land remain. In Pennsylvania, conveyancing is founded on the lien of a judgment being limited to the defendant's title at the date of its entry. A judgment against a partner does not bind his quota of the firm land. His share is only an ultimate balance of account, and entitles him to no part of any specific asset. The judgment would not have anything to bind until the balance is struck, and then the portion would go to him as a new acquisition. If a judgment was recovered against a firm in which the partners held real estate as tenants in common, and subsequently judgment was recovered against a partner, the judgment against the firm would take precedence on his moiety, because the lien binds each partner's land from the entry of judgment. § 109, n. 7. After the firm uses are exhausted, the land goes back to the partners, and vests in them as land, giving the widow of a deceased partner dower, and not a third outright, and goes to heirs, and not to personal representatives. The fiction of re-conversion has been applied to prevent a judgment from binding the land of a partner after the firm purposes had been subserved. Yet the heir's title relates back to the partner's death. and the widow's dower attaches at that instant. If the title relates back for devolution upon the heir, and for transmission to the widow, the relation should take place for the creditor. § 109. If the partner holding title should convey it to his wife, the co-partner's remedy would not be barred by the Statute of Limitations. The remedy at law would be inadequate, and a bill would lie to compel an account and a re-conveyance. § 110, n. 2. The heir of a deceased partner could be compelled to execute a conveyance to a purchaser from the firm. § 110, n. 3. The separate creditor could not claim payment out of the proceeds of land if on a settlement of account no balance was due to his debtor. § 110, n. 4. No separate judgment or lien binds the firm title, nor does execution or attachment affect it. § 110, n. 5. Improvements made by the firm belong to it, and cannot be taken by the partner holding title, without compensation. § 110, n. 6. If he mortgages or sells the land, the title will pass, under the mortgage, to a *bona fide* taker. § 110, n. 7. Notice, however, will prevent the mortgagee, or vendee, from taking title to the improvements. § 110, n. 8. In personal property the separate creditor cannot claim title on the ground that he thought the property belonged to the partner, because he paid no consid-

eration; but in land the title may be conveyed if no notice of firm title. § 110.

There is no marshalling of liens. Therefore, the lien of a joint judgment-creditor will not be controlled so that a separate judgment-creditor can be paid out of the partner's land first. Equity cannot devest the lien, but follows the law. § 111, n. 1. Nor can Equity restrain a judgment-creditor from proceeding by execution against the separate partner's real estate. § 111, n. 4. The creditor, however, does not lose his privilege by proving against the firm in bankruptcy. § 111, n. 5. The firm cannot take title, as it has no existence except in the partners. But a deed to A & B, trading as A & Co., is recognized as a conveyance for the firm, and makes the land firm assets. § 111. n. 2. If the deed is simply to the partners, they take title as individuals, and judgments against them bind the land in Pennsylvania. § 111, n. 3, 11. Judgment against the firm binds its title, and also land of the individual partners. The lien dates from the entry of judgment upon the record, and cuts out a subsequent judgment against the separate partners. § 111, n. 6, 7, 8, 9. In Pennsylvania, apart from judgments against the title-holder and the lien, the land is marshalled, like personalty, among the joint and separate creditors. Thus, if A held the title, the land would be marshalled between the creditors of B and the creditors of A & B. § 111, n. 9. In other States than Pennsylvania, the judgment against a partner, although he holds the title, binds only his interest, and is cut out by debts of the firm subsequently incurred. § 111, n. 10. The partner's mortgage for a firm debt makes his land firm stock to that extent. § 111, n. 16. Except against *bona fide* purchasers, who did not know of the firm title, the land is marshalled for the firm creditors. § 111, n. 15. A partner's lien for advances has a preference over the lien of the separate creditors of a co-partner in land held by him for the firm. § 112. n. 6. *v.* Advances.

The use of land for the firm, or the purchase or improvement of it with firm funds, is competent evidence to show the title to be in the firm. § 112, n. 3. The employment of a partner to raise the purchase-money to buy land for the firm, would make him a trustee. The purchase-money belonged to the firm which paid the commission for getting it. § 112, n. 4. Judgment against the title-holder is not a lien against the firm creditors. § 112, n. 6. The co-partner's lien for advances cuts out judgment against the partner holding title. § 112, n. 6. The title results to the firm if it pays the price. § 112, n. 7. Notice of the firm title is sufficient to exclude the claims of separate creditors, and make a purchaser, or mortgagee, take subject to the title. § 112, n. 10, 11, 12. The widow of a partner is not dowable out of firm land. The substantial interest is in the firm, and the partner's seizin is technical, which gives no right against the firm creditors. § 112, n. 13, 14. In Pennsylvania, where the title is superior to firm creditors, the widow is cut out by the theory of the lien of a decedent's debts. § 112, n. 15. In New York, dower, which attaches on account of the tenancy in common, is legal, but the firm creditors are both legal and

equitable. § 112, n. 16. A single partner could convey real estate which was held for both partners as tenants in common, though for the firm use, but in Pennsylvania he could not pass title without his co-partner's joining in the deed. § 112, n. 18. Partner can sell his interest in real estate, though not, it should seem, specifically, for he has no quota until the balance is struck. § 112, n. 20.

The record system in Pennsylvania charges the title-holder and ignores the beneficial owner. The deed is taken as the embodiment of the parties' intention. If the grant is made to the partners, they take as tenants in common. Neither purchasing the land with firm funds nor using it for firm purposes, nor both combined, will overcome the form of the conveyance. The deed cannot be contradicted by parol. Not only purchasers and mortgagees rely upon the record-title, but creditors are assumed to contract with reference to the debtor's title. The notion did not originate in Partnership law, but was taken from the lien of a decedent's debts. In that branch of law, judgment creditors, though not protected by the recording acts, are protected against any shifting of title by parol evidence. The interence from giving the judgment a lien was that the creditor contracted on the faith of the record, and then had a lien without reference to his judgment. § 113. No use results against the legal title, but apart from the title-holder, the use will result to the real owner. § 113, n. 4.

LANDLORD AND TENANT.

v. Subject-Matter. The title to the crops is in the tenant. By the general rule, he has possession for his term, and this invests him with title to the crops, as incident to his possession. The landlord's creditors could get at his share by attachment, or any process which did not interfere with the tenant's possession, but notified him to hold, or pay over, the landlord's share when set apart to them, and not to him. An execution and sale of the landlord's share of the growing crops during the term would not pass a title. The execution does not sever the title, as if the law acted for the tenant who neglected to set apart the landlord's share. A cropper is not a tenant who is entitled to possession. He is paid for his labor in kind out of the crops, and has no right to possession, or title to any part of the crop until it is paid to him. All the States do not treat the tenant as entitled to possession. Massachusetts and New York treat the landlord and tenant as co-occupants, with sufficient title in the land to protect their interests in the crops. If the tenant converts the landlord's share, trover would lie for the conversion against the co-occupant. Each, or both, might sue the stranger for a trespass or conversion. All might assert the title, or, if one's share was sought to be taken, he would have special cause for suit. They could agree for a division, and exclude a joint suit. § 12.

LAW MERCHANT,

Does not regulate partnership. § 3. Created power to sell co-partner's share. § 5. Did not charge contributor who took no part in management with unlimited liability. § 37.

LEGISLATION.

Acceptance of legislation in its favor by a Pennsylvania corporation, subsequent to the Constitution of 1874, might take away rights acquired by previous contracts with the State. The corporation would be reduced to the condition of corporations incorporated under general statutes, and would be subject to the control of the legislature. § 24, n. 10.

LEIST, Dr. B. W. Origin of partnership. § 1 & n. 2.

LENDER. v. EVIDENCE.

LIABILITY, PARTNER'S.

By the contract which partners make in transacting firm business, they bind themselves as men not less than as partners. The law can make no limitation upon this universal liability, and recognizes no liability in one capacity, i. e., as partner, and not in another, i. e., as an individual. The contract was treated as a Common law formula. The partners were at first treated as making a joint, and subsequently a joint and several, contract. On the question of liability, partners are nothing but joint obligors. v. Consent. v. Contract. If partnership is simply a species of the Common law joint obligation, the effect is that on the question of a partner's liability no partnership need be alleged, or proved, in order to charge him with liability. The denial of partnership would be irrelevant; it would not answer the charge, which might be made out, without proof of partnership, by showing any joint transaction. A plaintiff should be on his guard against accepting the issue of partnership, or not, because the issue would narrow his claim and shift the burden upon him of proving a partnership, in order to recover, when that might not have been necessary. § 44. The question of partnership is important in reference to the powers of a partner. The partnership creates implied powers to carry on the business, and proof of partnership becomes essential to one who relies upon the exertion of such powers. § 49, n. 1. Taking profits by creditors does not charge them as partners, because they are not proprietors. v. Profits. No limitation of liability at Common law. v. Capacity as partner. Liability to creditor as a partner no answer to a charge of usury, because a personal debtor. § 66.

LIBEL of editor charges co-partner. § 140, n. 4. v. Torts.

LIEN.

For a partner's advances. § 165. v. Advances. A separate execution does not create a lien on the partner's share. The execution seizes and

sells his right, title and interest, like any defendant's in execution, but the property being vested in the firm, the partner's share is nothing tangible, and depends on an ultimate balance of account. § 104, n. 6; § 100, n. 4. Partner's lien on firm assets for his advances. *v.* Advances. Liens not marshalled. § 111, n. 1. General lien covers stocks of different firms composed of the same members, because but one firm in law. § 164, n. 3.

LIMITATION.

Statute of. Bars action for, and action upon, a settlement. § 213. *v.* Account. The trust imposed upon the purchaser of firm assets who agrees to pay the debts is within the Statute. § 145 & n. 1 & 2. Neither acknowledgement or part payment tolls Statute against co-partner. § 178, n. 6 & 7. Action for land conveyed to wife of partner not barred by. § 110, n. 2. Partner's confessed judgment will not revive debt barred by Statute of Limitations. § 122, n. 6. *v.* Powers. Alleged excuse for making judgment bar remedy against dormant partner. § 84, n. 1. *v.* Procedure.

LIMITED liability. *v.* Special Partnership.

LINDLEY,

Lord. States that the Legislature introduced limited liability. § 37, n. *b.* Firm a *bona fide* purchaser of trust funds from trustee-partner. § 40, n. 1. Sharing profit and loss a partnership. § 61. n. 1. Set-off of individual debt by surviving partner a breach of the relation. § 130, n. 14.

LIQUIDATED claim a set-off. *v.* Set-Off.

LIQUIDATION.

The partnership is continued after dissolution only for liquidation. § 183. The liquidating partner represents the firm for this purpose. § 184. The effect of a partner's denial of his co-partner's authority to make commercial paper is to put the holder upon proof of consideration if received from the co-partner, and of his authority. § 184, n. 3. The liquidating partner's note was held to merge the firm debt, and precluded the creditor's recovery against the other partners, but, unless the note was treated as an individual contract, which was made by both parties to supercede the firm contract, the note should be considered as a firm note, made in his capacity of liquidating partner. § 184, n. 3. This resulted from the New York decisions, which deny the liquidating partner's capacity to make commercial paper, and precluded the natural construction. The form in other States is not notice of an individual transaction, but the character of the paper is for the jury. § 184, n. 6. If no liquidating partner is appointed, any partner could act, and unless the co-partners prevent him from acting, they will be bound for his liquidation. § 185. The liquidation by continuing partner is part of his security for the price of retiring partner's share. § 186. The appointment of a partner is irrevocable, because coupled with an interest; the appointment of a stranger is revocable, and

a release by a partner extinguishes the debt, although the debtor had notice of the appointment. § 187. This does not apply to a judicial appointment, nor to the appointment by contract made as security for the advance of the retiring partner's interest in the firm. § 186. A liquidating partner is not entitled to compensation for his services, though he may employ clerks, at salaries, to assist him. If the articles provide for compensation to partners, the surviving partner who was appointed receiver by the court could recover only for his services as official liquidator. § 188. The general creditor, though without a judgment, has a standing to control the liquidating partner. § 189. The liquidating partner will be displaced only by the necessity for a receiver. § 190. Distribution. *v.* Distribution. A purchaser of a partner's share is interested only in liquidation. *v.* Execution. A surviving is practically a liquidating partner. The rights survive, but the beneficial interest goes to deceased partner's representatives. § 130, n. 13, 14, 15, 16.

LITIGATION

Between Partners. No action lies during the partnership. A suit would involve a settlement of every item in the account, and a dissolution. § 153, n. 1. Trading in corporate form does not avoid the difficulty, § 153, n. 2, which underlies any partnership business. § 153, n. 3. Partner's payment of a firm debt does not entitle him to subrogation, for he is not entitled to repayment until a final adjustment, § 154, n. 1, though subrogation is permitted between firms with a common member. § 154, n. 1. A partner cannot sue his co-partner for mismanagement during the partnership. The damages enter into the account. § 155, n. 1. No set-off avails between partners. The claim is not liquidated, § 156, n. 1. A partner has no quota of a firm debt to be set-off. § 156, n. 2. A partner cannot set-off his advances made to pay firm debts against the price of his co-partner's share. The account must be settled before the co-partner's share could be ascertained, and this is still more necessary if there is a third partner. § 156, n. 5. The account will not be taken as accessory to any other litigation. The partners must be parties to the proceeding. § 156, n. 6. The account stated is a settlement by agreement, and equivalent to an account. If a balance has been agreed upon, assumpsit will lie without an express promise to pay the balance. The promise would be implied as a consequence of the settlement. § 157, n. 2, 4. The balance struck might be shown to be erroneous. § 157, n. 1. Debt would lie to recover the balance, but not case, which involves an unliquidated claim. § 157, n. 3. The prohibition does not affect an independent transaction which is not involved in the firm account. A partner may sue his co-partner upon such a claim, for they are strangers in reference to it, e. g., a contribution which is antecedent to the firm. § 158, n. 1. Partner may sue firm of which his co-partner is a member for loans. The transaction is foreign to plaintiff's partnership. § 158, n. 2. If partnership consists of a single transaction, a partner may, without an account, sue his co-partner for a share of the

profits. § 158, n. 3, or if no other partnership business remains to be settled. § 158, n. 4. Account during partnership governed by same principle. § 159. *v.* Account.

LOAN

To partner for his contribution, does not make lender creditor of the firm. The firm creditors would cut him out. If the lender obtained judgment, the consideration could be investigated, and the judgment set aside as fraudulent against firm creditors. § 19. Loan for share of profits. § 64. *v.* Evidence. Loan without any personal debtor. § 64, n. 3, *a.* *v.* Evidence. Loan without, or even with, control. § 64, n. 3, *b.* *v.* Evidence.

LOSS. Sharing loss said to be conclusive of partnership, § 61, but not unless by proprietor. § 61; § 57.

LOTTERY. § 211, n. 2. *v.* Illegal Business.

LOWRIE, C. J. Failure of redress against each partner and his estate result of procedure. § 86, n. 2.

LUNACY of a partner suspends the partnership. § 173. Ground for a dissolution. § 173 & n. 11.

MAINE continues firm debt against deceased partner's representatives. § 88. *v.* Procedure.

MAINE, Sir Henry Sumner, LL. D. Joint ownership original type of property. § 98, n. 1.

MALINS, V. C. Solicitors investing client's money without submitting securities for approval. § 140, n. 1.

MANAGING

Business, evidence of partnership. *v.* Holding Out. Makes partner explain his failure to earn profits. § 206, n. 4. *v.* Account. Managing business by direction of proprietor. § 59, n. 2. 4th Exception. Managing needs explanation. § 69, n. 2.

MANSFIELD.

Partnership a refuge for usurer. § 66, n. 1. Remodelled procedure. § 88, n. 1. Effect of his admitting a plea in abatement. § 92. Attorney no power to represent without authority. § 119.

MANUFACTURING.

Partnership in. The manufacturers might carry on the industry in partnership, and sell the goods on separate account. § 7 & n. 6.

MARKBY, Dr. Wm. Joint tenancy transition from commercial to individual ownership. § 98 & n. 2.

MARRIAGE of a woman partner dissolves the partnership. § 173.

MARRIED WOMAN,

A partner. *v.* Wife. Right to marshall assets. *v.* Holding Out. Unless exempt from Common law liability, a married woman cannot contract as a partner. She can act as agent of her husband, assert his rights, and become subject to execution by separate creditor. § 138, n. 1. If a partner, her husband is disqualified by interest from testifying. § 138, n. 2. A husband is liable for his wife's ante-nuptial partnership debts, although he does not acquire her property by marriage. § 138, n. 3. A husband can trade as agent of his wife, and his separate creditors are postponed to firm creditors. § 138, n. 4. The ratification by a married woman after discoverture relates back and validates all firm transactions. § 138, n. 5. A married woman may marshal the assets in relief of her liability as a partner. § 69, n. 19. Wife of partner taking title must re-convey to co-partner. § 110, n. 2. *v.* Land,

MARSHALL, C. J., carried out revolution in procedure begun by Mansfield. § 93 & n. 1. *v.* Contract.

MARSHALLING ASSETS.

The liability of a nominal partner entitles him to marshal the assets in relief of his liability. § 69, n. 19. *v.* Holding out. Among joint and separate creditors of partners trading in individual partner's name. *v.* Procedure. The exclusion of firm creditors from the separate estate in the first instance arose from the equitable doctrine of two funds. Chancery restricted the joint creditor to one fund when he had two in order to let the separate creditors have one. If the joint creditors came on the separate fund, they had to allow the rate received from the joint estate to the separate creditor. This involved a sharing of the joint estate by the separate creditors, though not in the first instance, and only by relation. From this equitable adjustment resulted the practical exclusion of the joint creditors from the separate estates which thus reserved for separate creditors gave them a standing in opposition to the joint creditors. But the separate creditors' right is not acknowledged at law, and exists only in equity, for if there are no joint funds, the joint creditors assert their right to come on the separate estates, and equity has no ground to interfere with the exercise of the legal right. § 102; § 193, n. 1. The Pennsylvania vagary of marshalling assets arose from overlooking the historical origin of the relation and trying to work it out from contract. § 104. The classification of creditors, or dividing them into joint or separate, reveals the system of marshalling which prevails. The opposite theory would exclude any joint fund, and let the firm creditors compete with the separate creditors of each partner. § 105. But the existence of a joint fund and the liability of the separate estate for the joint debts are never denied, but constantly acted upon. Equity interferes only to restrict the exer-

cise by the firm creditor of his legal right, and can do this only by imposing a condition, or putting him, as it is expressed, on terms. He can share the separate fund only upon the condition that he first permits the separate creditors to take a dividend equal to the rate which the joint fund yielded. The effect of this interference by equity involves a division of the joint fund between the joint and separate creditors, if the firm creditors proceed against the separate estate. It is this practical result which has led to the bankruptcy rule, and which explains its origin and acceptance. If equity can indirectly bring about an allotment of the assets, why not make it outright and at the start? § 105.

In Pennsylvania the assets were originally marshalled by letting the firm creditors take the joint assets, and also come in upon the separate assets with the separate creditors, though not until the separate creditors were allowed a rate equal to the partner's quota of the joint estate. § 105, n. 1. The right of the joint creditors to resort to the separate estate when they have no available joint fund, i. e., no solvent partner, or the joint fund is exhausted in costs, is acknowledged, § 105, n. 2, 3, and is inconsistent with any exclusive right of the separate creditors. § 105.

Marshalling assets shows the want of principle. The practical necessity of keeping the stock from the execution of separate creditors had to be admitted in all Countries. The legal reason for the exclusion has not been adequate to explain it, and the rights which result from it to the joint creditors. Partnership exists, and its existence can be maintained only by preserving the stock for firm creditors. If separate creditors could seize and sell it the firm would be broken up without any partnership justification. The theory that joint and separate creditors have equal access to both the joint and separate estate means either a severance of the title and no joint stock, or the brotherhood which makes all the property of each partner the common stock of the fraternity. But the business partnership is not a *societas omnium bonorum*, nor can it manage to trade with stock, which belongs to the separate partners. § 191. The *peculium* gave a person not *sui juris* the right to trade exclusively upon the credit of the fund, but a person *sui juris* had no such privilege. The *institor*, or agent to manage a business, was well known, but no mention is made of limiting a principal's liability to any particular business when carried on by means of an *institor*. § 191. The analogy of sale, which might help to segregate the stock at the Roman law, would not avail at the Common law. § 191. A firm creditor could relinquish his priority by agreement with the separate creditor, but the separate creditor has no right except by his contract. § 192, n. 2. A surviving partner is a trustee for all the firm creditors, and cannot prefer one of them. § 192, n. 1. It has been held that all the partners might prefer a creditor, although the firm was insolvent. § 192, n. 1, *a*. That a subsequent judgment creditor of the firm could not contest a prior separate judgment which took the assets. § 192 n. 2, *a*. But firm assets diverted to payment of a separate debt may be recovered by the assignee in bankruptcy from the partner's separate estate.

§ 192, n. 3. A withdrawal, however, by a partner, though without his co-partner's knowledge, will stand, if not made in expectation of insolvency. § 192, n. 3. The right of the joint creditor against the separate estate subsists in chancery, as is seen in the lien of a judgment against the firm land; it cuts out the separate judgment creditor, and will not be disturbed for his benefit. § 193, n. 2.

The unlimited liability imposed by law upon a partner who contributes only a portion of his property to the firm, induced a re-action against the excess of liability. This was the work of equity, which controlled the exercise of the legal right, when it invaded the estate which the partner did not contribute to the firm, § 195, that is, when equity, by its principles, had cognizance of the distribution. § 196. The firm creditors do not depend upon the partner's equity and the partnership contract, but have an independent and a direct recourse to the joint stock. § 194, n. 3. The destination made by the partners of the stock creates the joint estate, and thus enables them to trade with it. The creditors contract upon the faith of the estate. The destination is the remote cause of the firm creditors' right, but they acquire the lien by dealing with the partners. § 194, n. 4, 5. The partner's debt to his firm is not collected upon insolvency, unless incurred by fraud, then it is, and the firm creditors can enforce payment or restitution. § 197, n. 2. The bankruptcy rule protects only the separate estate. If a firm creditor is secured by a firm mortgage and by a partner's individual mortgage, a general creditor cannot pay the debt and be subrogated so that he can come against the partner's separate estate in preference to his separate creditor. Paying the firm debt extinguished the mortgage, which was collateral to it, and the assets are marshalled according to the class of creditors. § 197, n. 1. A partner might enforce his individual claim from his co-partner if no surplus would remain for the firm creditors after the debtor-partner's separate creditors are paid. § 197. The firm creditors might be subrogated to the creditor partner's claim. But not if the surplus and the enforcement would be a competition with firm creditors. For the partner is himself liable to the firm creditor, and precluded from interfering with the collection of his claim, which he should, but does not, pay. § 198. If both partners are insolvent, the firm creditor would have no surplus, and they might collect debts from each other. § 198, n. 1, *a*. Firm creditors may be subrogated to place of retiring partner, and enforce his rights as seller, if they renounce the joint estate. But they cannot claim the price he received and also the assets for which it was paid. § 200. Payment of all the firm debts would enable the partner to enforce his claim against the co-partner. § 201, n. 2. Partner is a separate creditor of his co-partner for balance of partnership account. § 201, n. 4. The debt of a partner to the firm is not an asset, and if it were, could not be set-off against a co-partner's debt, for the firm creditors are paramount, and would collect both. § 202. The debt of the firm to a partner could not be collected, because he owes the firm creditors in his individual capacity, and can not compete with them while he fails

to pay them. § 202, n. 2. If the surviving partner is indebted to his firm, and joins a succeeding firm, he could not be compelled by the subsequent firm to pay his debt to his original firm, nor could the deceased partner's estate be compelled to pay his indebtedness; but if the succeeding firm is subrogated to the creditors whom it has paid, it may collect the deceased partner's indebtedness, although it does not collect the surviving partner and common member's debt. § 203. When the deceased partner's estate was exempt at law from liability for firm debts, the executor could not recover the share. The estate being liable in equity, could not compete with firm creditors by withdrawing the assets pledged to them. If the payment of the deceased partner's share was guaranteed by his co-partners, or firm assets were lost by their mismanagement, he could enforce the separate liability in competition with their separate creditors, provided the firm creditors were paid. § 204. The bankruptcy rule being statutory, is repealed by any legislation inconsistent with it. § 204, n. 3. The Common law disregarded the common member on the joint contract formula, and made him liable on the contracts of both forms. Equity put the creditor to an election between the two, although it had no ground to deprive the creditor of his independent remedies, and the object of equalizing the distribution could not be attained. The Bankrupt acts have restored the right to double proof. In America the remedies might exhaust the different members in succession. § 205. The argument against election under the superceded rule, was that the surplus went not to the other firm, but to the individuals, and no election is enforced in bankruptcy between the joint and separate estates. § 205, n. 6. Partner may marshal assets to reimburse his outlays on behalf of the firm. § 184, n. 3. *v.* Advances. If the continuing partner who has agreed to pay the firm debts is insolvent, the retiring partner, or the firm creditors, could enforce the agreement. A bill in equity would lie for the creditor's equity. § 147, n. 2. Retiring partner's liability founds his equity. § 147, n. 1. Creditors of new and old firm share assets. § 147, n. 3. Separate creditors rank as joint creditors when firm transacts business in name of individual partner. § 76, n. 23. *v.* Procedure.

MARYLAND

Corrected Common law process against partners. § 82. *v.* Procedure. Maryland practice suggested death of partner on record and substitutes representative of deceased with surviving. § 88. *v.* Procedure: also after judgment. § 89. *v.* Procedure.

MASONIC Lodge. *v.* GAIN.

MASSACHUSETTS, debt theory of contribution. § 31. *v.* Contribution. Not consistently maintained. § 35, n. 2, 3.

MATTHIAE. Differences of opinion among Civilians as to joint and separate creditors' standing. § 108, n, 4.

MAYNTZ, Prof. Charles. *actio tributoria.* § 165, n. 6.

MEASURE of damages, for breach of contract in dissolving partnership. § 212, n. 3. *v.* Damages.

MERCHANT, LAW.

The Common law did not adopt the Law Merchant. § 3; § 77. By the Law Merchant the concurrence of ownership and management was necessary to create the unlimited liability of a partner. The contribution did not charge him with liability unless he took part in managing the business. § 3. Covert attempt was made to introduce Law Merchant by getting rid of the doctrine peculiar to the Common law of an undisclosed principal. § 26.

MEREDITH. Argument that sale includes pledge. § 4, n. 1.

MERGER of claim in judgment. *v.* Contract.

MICHIGAN

Prevents judgment against the partner from merging claim against co-partner. § 82. *v.* Procedure. Death of co-judgment debtor does not exonerate his estate. § 89. *v.* Procedure. Release of partner and not of co-partner. § 90. *v.* Procedure.

MINING PARTNERSHIP

Is a distinct species of partnership. There is no choice of partners, and owning a share of the firm property makes the owner a partner. The purchaser of an interest becomes liable, like a partner, for all the debts of the firm. There is no limit to the liability of a mining partner. He has a lien for his advances to the firm. Any purchaser of an interest assumes that debt as well as the debts to the firm creditors. A court does not interfere with the management of a mining partnership for the same reason that it appoints a receiver of a commercial partnership. Nothing but the threatened destruction of the business will induce a court to intervene. The partners deal at arm's length with each other in reference to their separate titles, and one partner could compete with the firm and buy out his co-partner's individual title. A mining partner's authority is defined by the requirements of the mining business. § 15.

MINNESOTA

Severs joint cause of action and gives remedy against any obligor. § 88. *v.* Procedure. After judgment. § 86. *v.* Procedure. Release of partner, not of co-partner. § 90. *v.* Procedure.

MISCONDUCT not ground for dissolution, unless it excludes the co-partner. § 173 & n. 9.

MISE. *v.* CONTRIBUTION.

MISSISSIPPI Provides remedy against surviving and representatives of deceased partner. § 88. *v.* Release of partner, not of co-partner. § 90. *v.* Procedure.

MITCHELL, Judge J. T. States old rule in Pennsylvania for marshalling joint and separate assets. § 104, n. 1.

MOLLOY. Trade gives partners capacity. § 35, n. 3.

MONTAGU, Basil. Separate commissions under old practice kept assets distinct, and made separate subject to joint debts. § 103, n. 13.

MORAWETZ. Argument for *de facto* corporation. § 24, n. 6. 9.

MOTIVES

Of partnership incompetent evidence, § 69, n. 5, except where parties dealt with knowledge. § 67. Motive might be to establish co-partners in business. § 48, n. 3. *v.* Partnership.

MOYLE, J. B. Civil law indivisible contract. § 91, n. 3.

MUTUAL COVENANTS to make land assets. § 105, n. 5; § 112, n. 1. *v.* Land.

MUTUAL INSURANCE, or Protection. § 16, n. 2. *v.* GAIN.

NAME.

No firm name necessary in legal proceedings. The name is surplusage, for the reason given (*v.* Co-Principal and Liability) that the question of liability is independent of the firm, and may exist without a partnership. § 44. A partner can sign his co-partner's name. He represents his co-partner, and if the partners have not adopted a firm name a partner may select one for them. § 17. Partners may trade without a firm name, and in joint ventures, especially, by two or more firms, this is the usual method. A firm name would be as inconvenient as unnecessary. Partners may be charged on commercial paper, though not parties to the instrument. § 44. Name of partner in firm designation charges him. *v.* Holding Out. If partner's individual name the firm designation, the presumption in Pennsylvania, and elsewhere; if the designation of two firms, creditor's choice. § 76. *v.* Procedure. No name necessary, and surplusage in legal proceedings. § 76. *v.* Procedure. Partners who agree to sue and be sued in a firm name cannot object if sued in that name. § 76, n. 7. *v.* Procedure. Use of fictitious name, though prohibited, does not prevent recovery, unless credit acquired by the name. § 76, n. 15, 16 & 17. If individual name the firm designation, presumption in Pennsylvania that commercial paper on firm account; elsewhere on individual account. § 76, n. 18, 19, 20, 21. If individual name designation of two firms, creditor may elect. § 76. n. 22. *v.* Procedure.

NAPOLEON, CODE

Adopted Felicius' definition of partnership, § 16, n. 6, *d*. Divides profit and loss, in default of agreement, according to contributions, § 36 & n. 2. Makes contribution firm property. § 31, n. 3; § 33, n. 1.

NEBRASKA statutes make firm a party. § 76, n. 1. *v*. Procedure.

NEGLIGENCE. *v*. TORT.

NEW JERSEY provides remedy against deceased partner's representatives. § 88. Release of partner, not co-partner. § 90. *v*. Procedure.

NEW YORK

Opens judgment obtained by unauthorized appearance, but does not avoid it. § 119. Forbids fictitious, and requires actual, names of partners. § 76, n. 15.

NOMINAL partner's equity, see Equity. Sued with partners in fact. *v*. Holding Out. As co-plaintiff. *v*. Procedure. Not bound by co-partner's admission. § 146, n. 3.

NON-COMMERCIAL PARTNERSHIP. *v*. Trade. Mining partner no power to bind firm by commercial paper. § 15, n. 4. *v*. Mining partnership.

NORTH CAROLINA corrected the Common law procedure. § 82. *v*. Procedure.

NOTES. *v*. COMMERCIAL PAPER.

NOTICE

By retiring partner to creditors makes him surety for continuing partners in New York. *v*. Change of partners. Notice to third person revokes implied authority of co-partner. *v*. Powers. No notice required upon dissolution by death of a partner. § 175 & n. 1. Notice to different kinds of customers. *v*. Dissolution. Notice to party holding out, implied delegation of authority. § 69, n. 12.

NOVATION. *v*. CHANGE OF PARTNERS.

OHIO did not recognize attorney's appearance without authority. § 119, n. 1, *a*. Release of partner, not of co-partner. § 90. *v*. Procedure.

OPTION

To become partner. The option when exerted, does not make the option-holder a partner by relation, unless the privilege was equivalent to a direct control of the business. The natural inference is that the partnership begins when the option is exerted, and the relation to the commencement of the business must be proved. § 18.

ORAL CONTRACT of Partnership. § 10. *v.* STATUTE OF FRAUDS.

ORPHANS' COURT. No jurisdiction over partnership by reason of its distribution of a deceased partner's estate. § 216 & n. 1. *v.* Account.

OSTENSIBLE partner cannot compel joinder of dormant partner as co-defendant. § 76. *v.* Procedure.

OUTGOING PARTNER. *v.* CHANGE OF PARTNERS.

OVERDRAFTS. § 165, n. 3. *v.* ADVANCES.

PARSONS, JAMES. Tort confounded with contract. § 47, n. *a* & *b*.

PARSONS, Dr. Theophilus. Partnership both corporation and aggregate of individuals. § 100, n. 2, *b*.

PARTIES.

The legal excuses for non-joinder are infancy, discharge in bankruptcy or insolvency, absence from the jurisdiction, or lost by statute. § 84, n. 1. *v.* Procedure. Surviving and executor of deceased partners may be joined. § 88. *v.* Procedure. The partners are the parties in all litigation, and as a partner cannot be both plaintiff and defendant, no claim by or against the firm is collected. § 160. *v.* Procedure.

PARTNER.

A proprietor, for by the Common law the possession of property did not give the possessor the authority to sell. The purchaser must prove authority from the owner, or ownership by the vendor. It was necessary, therefore, that third persons should treat a partner as a proprietor. § 4. Property measures partner's capacity. § 99, *et seq.* *v.* Agency.

PARTNER'S EQUITY. *v.* EQUITY.

PARTNERSHIP.

The natural division of the subject: 1, Entering into partnership or the relation; 2, The principles which regulate it in action, and 3, By which the business is wound up. At Roman law, a contract between the partners in which third persons had no interest; at Common law, the interest of third persons is the main subject of attention. The Common law does not, as the Roman law did, regulate the private bargain of the partners. Partnership came into the Common law through trade. § 1. *v.* Trade. The Common law introduced a change in the character of the relation, and interjected the feudal notion, that property was the principal thing, and man the accessory. § 3. The contract, if written, is for the court; if oral, for the jury, who then find the terms of the contract, and the court decides the legal effect. § 21. If the facts are uncontradicted, the court excludes the jury. Intention is not equivalent to a contract of partnership. There is room for penitence or reconsideration. There is

no consideration or binding agreement. § 23. Partnership as qualification for incorporation. v. Incorporation. Partnership involves title to firm stock. v. Contribution. A partnership in the profits and not in the stock, is a misnomer. The partner is paid out of the profits, but is not a proprietor, and therefore, not a partner, but only an employee. The legal aspect of the partnership is the relation as it affects third persons. § 48. This has not been recognized, because the origin of partnership was between the partners. But in modern law, the domestic arrangement is not controlled by law, but left to the partners. They can adjust the terms to suit themselves. § 48. One may own all the stock, or lend a co-partner, without renouncing the right to repayment, and profits may be additional to interest. § 48, n. 2. Profits may be given for the loan of one's name or credit; all without being partners between themselves. § 48, n. 3. A partner could indemnify his co-partner. The contract was thought to lack consideration, but the contract of partnership supports the particular provisions. § 49, n. 3, *a* & *b*. A partner might act wholly for his copartners, and not have any interest in the business. His motive might be to establish them in business. § 49, n. 3, *c*. There is no partnership in buying apart from selling. § 7, n. 1. v. Buying. In manufacturing. § 7, n. 6. v. Manufacturing. When the arrangement between the partners is brought before the court, the law interprets the provisions, in order to give effect to all. If inconsistent with each other, the general purpose controls the minor provisions. § 50. The constituent elements of partnership are: The destination of the stock, which involves control and prevents diversion to another object; accounting for the disposition and management, which implies such destination; sharing profits and agreement to devote oneself to the management of the business. The eccentric character of partnership at the Common law is caused by the dual position of the partners. They contribute stock, which is the estate pledged to creditors. The law, however, does not limit their engagements to the stock, but by imposing an unlimited liability, charges all their separate property also for the firm debts. The partner's contracts bind him as an individual, and charge his separate estate. § 99; § 100, n. 1. Thus, his creditors come into competition with the firm creditors. § 102. Relation founded on status, not contract. § 104. Definition of partnership in French code. § 16, n. 6, *d*. Partnership extends beyond trade. It has outgrown trade, and now embraces manufacturing, which is not a trade, but an industry, and extends to any "business," which parties join in transacting § 7. The original constituents of buying and selling need not coexist in the business of a partnership. Neither buying nor selling need be an element of the partnership business. § 7.

PARTNER'S NAME as firm designation. v. NAME.

PAXSON, J. *Cestuy que trust* may waive tort, and sue in assumpsit for trust funds. § 141, n. 1.

PAYEES. Joint payees of commercial paper. v. Commercial Paper.

PECULIUM. *v.* MARSHALLING ASSETS.

PENNSYLVANIA,

Constitution of, prohibiting special legislation. § 37, n. 2. Only State which divides the loss of capital according to the contribution. § 34. A partial loss of capital is also distributed according to the contribution. § 35. Pennsylvania practice for *pro rata* distribution of assets. *v.* Execution. Pennsylvania conveyancing. § 109, n. 7. *v.* Land. Record-system controls firm title to land, and prevents marshalling assets. § 113. *v.* Land. Vagary of marshalling assets. *v.* Marshalling. Pennsylvania lets attorney of court represent others and bind them by judgment. § 119. *v.* Powers. Partners no power to submit firm claims to arbitration. Facts in case limited decision to firm assets. § 120, n. 1, *a* & *b*. Surviving partner an assignee of deceased partner, and excludes testimony against his estate. § 121. Trading in individual name presumed on firm account. § 76, n. 18, 21. *v.* Procedure. Distribution to separate creditors as well as joint confirms Pennsylvania view. § 76, n. 23. *v.* Procedure. Pennsylvania corrected process by preventing judgment in joint action from merging claim against non-served partners. § 82. *v.* Procedure. If action not joint, judgment still merged claim. § 83. *v.* Procedure. Acceptance of service did not cause judgment to merge claim. § 83. *v.* Procedure. Pennsylvania passed act to bring in representatives of deceased judgment-debtor. § 89. *v.* Procedure. Release of partner without releasing co-partner. § 90. *v.* Procedure. Plaintiff permits partner to be plaintiff and defendant. § 161, n. 1. *v.* Procedure. Pennsylvania allowance of compensation to firm for management of business when called to account for trust fund. *v.* Trust funds.

PERSONAL REPRESENTATIVE. *v.* EXECUTOR.

PLEDGE.

Partner's right to. *v.* Powers. To mortgage share in future partnership. *v.* Powers. Power to pledge results from the power to sell and to borrow. § 123.

POTHIER. Title to contribution. § 34, n. 1. Construction of pearl case. § 63, n. 4.

POWER.

A partner's power to sell his co-partner's share of the firm stock, arose from trade, partnership being an organ of trade. All a partner's powers are derived from this right, apart from commercial paper. § 126. The power to sell, which is the badge of dominion, carries the right to make any contract with reference to a sale, and the correlative power to buy for a co-partner involves the right to contract for a purchase. Any contract, therefore, with reference to the trade is within a partner's power. § 3. The business gives the partners power to represent each other.

Trade is the groundwork of partnership, and the firm is an instrument of trade. The authority is implied by and limited to trade. A joint purchase, which involved a joint sale, would not necessarily be a partnership transaction. The object might not be gain, but might be sharing a loss, § 49, or a division of property. *v.* Joint purchase. Powers of partners derived through the joint estate. *v.* Property. *v.* Capacity as Partner. The partner's right to sell gives the separate creditor no ground to attach firm stock. The right is to sell for the firm, and the attachment must be for a firm claim. § 103, n. 3. If each partner sold his interest, the firm creditors would not be cut out. The sale must be joint, or the firm title will not be devested, but remain subject to the execution of firm creditors. Implied power depends on partnership, and unless established, none exists to bind by commercial paper. § 49, n. 1. The business of buying and selling gives a partner the power to sell the firm stock. § 5. The authority of a partner might extend to a sale of the entire stock. If made in the course of trade, the sale might be sustained as a valid exercise of a partner's authority. The stock might be old style and better replaced by new. In Pennsylvania the assignment of the whole stock was sustained, because the co-partner had absconded, and by the assignment the stock was saved from an adverse and forced sale by the execution creditor. But unless absent, the co-partners must be consulted, or the sale will be invalid. § 114. The right to buy corresponds to the right to sell. As to the extent of his correlative right to buy: He may buy articles which the firm is accustomed to use in its business, without reference to the actual use which he makes of them. The only limit to the amount of merchandise which he may buy is to be found in the proportion which the goods bear to the demands of the business. Ordinarily contributions are made before the business is begun, but if not, and a partner bought on credit, what he agreed to contribute, the firm would be charged. A restriction will not deprive a partner of the power, unless enforced by the co-partner, who rescinds the sale and returns the goods. § 115. The authority is implied from trade, which enables a partner to sell his co-partner's share. A contract made in negotiating a sale is part of it, and thus any dealings for the purpose of buying and selling are included in the business. The agency is defined, it is said, by the scope of the business. But the principle which enforces the limitation of the partner's power, springs from the co-partner's equity. The law extends the business contract, and makes it embrace the separate estate of the co-partner. As he did not contribute this fund to the firm, he is prompted by his self-interest to prevent any further invasion of his private domain than that sanctioned by the law. He disputes any obligation which does not arise necessarily out of the business transactions of the firm, because the obligation, unless impeached, would charge his separate estate. § 116. A partner cannot bind his firm by a specialty, because the seal precludes an inquiry into the consideration, and takes away by anticipation the co-partner's defence to the claim. Each partner is entitled to make a defence, because the judg-

ment binds his separate estate in the first instance. An executed contract is said to be an exception, because it does not charge, but discharges the firm. A single partner assigned a firm mortgage. The assignment, as an executed contract, discharged a firm debt, and the seal was surplusage. § 117, n. 1. He can assign a firm judgment. The judgment is a firm asset, which any partner or the assignee for creditors might sell, and, if bought in, would revert to the firm, § 117, n. 1. A release does not bind the firm; the seal does not preclude enquiry. Unless there is a debt, the specialty would create an obligation, in order to extinguish it. The transaction depends, therefore, for its validity, upon the consideration received by the firm, and not upon the show of a consideration contained in a seal. § 117, n. 2. The phrase, 'a partner may release a debt,' carries the point in its tail. The debt must be proved to exist before the power's arises. A partner could not give a bond and warrant for a loan made to his firm. The bond would be his individual obligation, and the judgment entered on the warrant would not bind the separate estates of his co-partners. § 117, n. 4. A power of attorney accompanying a certificate of stock, though executed, is to enable the holder to substitute himself for the principal. The act is not past, but future, and therefore does not stand by itself, but requires the seal to support it. § 117. The reason a partner has no implied authority to perform the act by a sealed instrument, is that the specialty changes the character of the contract. The Statute of Limitations is different. The implication would be general, and not limited to a single transaction. § 118. The right, however, is inferred from an express power delegated to perform the act. The express authority sanctions the act, and the seal is disregarded as surplusage. There is no risk of extending the authority to bind the firm by specialty, or of disregarding the seal in the whole class of specialties made by a partner for his firm. What would be gained by saying a partner could execute specialties for his firm, but that they would be disregarded as specialties, and treated as simple contracts? It is simpler to say at once that he must make simple contracts, in order to bind the firm. § 118. A partner can still, in some States, employ an attorney to appear for the firm. It is now held in England that he cannot, and the earlier practice, which was established in ignorance of Lord MANSFIELD's decision, has been disregarded. The only redress of the firm would be against the attorney, if solvent, and even then a stay of proceedings would not be granted, except upon payment of costs. § 119, n. 1. In New York the judgment obtained by an unauthorized appearance will be opened to let the firm into a defence, but will not be set aside as void. § 119, n. 1, *c.* In Pennsylvania, the character of an attorney, as an officer of the court, gives him authority to represent anybody. § 119, 1, *d.* Ohio refused to follow the English practice before it was discarded in England. § 119, n. 1, *a.* The correction was first pointed out in England by "E. W.," in 1847. The power to appear by attorney by a partner corresponds to the service upon him, and no claim has ever been made that a partner could accept service for his co-partner. § 119. A partner cannot submit firm

claims, or debts, to arbitration, even if the agreement is by parol. The contrary ruling in Pennsylvania was limited by the facts of the first case to bind the firm assets, and even in the last case, in spite of the comprehensive language, the opinion refers to firm property. § 120. The effect of the judgment upon the separate estate is the explanation. In States where the judgment is limited to firm assets, a partner may submit. Therefore, in New York the purchaser of a partner's share can submit a disputed claim to arbitration. The sale of the share empowers the buyer to represent the interest which is co-extensive with the firm property. As the award would bind only firm assets in New York, a partner can always submit to arbitration. § 120, n. 1 *b*. It is like a confessed judgment, which is limited in execution to the assets of the firm. § 120, n. 2. After the partnership is established, a partner can bind his co-partner by an admission made in the transaction of the firm business. The surviving partner is not an assignee of his deceased partner, so as to exclude the testimony of the opposite party in reference to transactions with the deceased partner. The surviving partner does not derive his title by assignment from his co-partner, but is an original owner by virtue of his joint title. § 121. In Pennsylvania the deceased partner is treated as the assignor, and the surviving partner as the assignee, and the death of a person excludes testimony against his estate in actions by or against executors, administrators, guardians or assignees. The disqualification has been curtailed by statute. § 121. A partner cannot confess judgment against his co-partners, and they can have the judgment stricken off against them. § 122, n. 2. But, in analogy to the service upon one partner, the firm assets can be taken in execution under a judgment confessed by a partner. § 122, n. 1, 2. The joint or separate character of the judgment would be fixed by the claim, which would be the only means of ascertainment, except where the special *fi. fa.* under the Pennsylvania act of 1873 shows the distinction between a joint and separate claim. § 122, n. 4. Where the judgment is confined to the firm assets, as in New York and Louisiana, a partner may confess judgment against the firm, because he does not charge his co-partner's separate estate. § 122, n. 5. Therefore a judgment confessed by a partner will not revive a lien barred by the Statute of Limitations. § 122, n. 6. Evidence that judgment confessed to defraud creditors puts judgment-creditor to proof of *bona fides*. § 122, n. 9. The limit of a partner's power to borrow is fixed by the usage of business. § 123. The power to pledge results from the power to sell and to borrow. § 123. A partner as a proprietor has the power of disposition over his share. § 171. If absolute, a dissolution results; if qualified, it does not. § 171. n. 2. The alienation is not accompanied by delivery of manual possession, and the alienee's rights are available only in Equity. § 171, n. 3; § 172. Partner's sale of his interest. § 171, n. 4; § 172, n. 1. *v.* Assignment. A partner can sell his interest in real estate, though he has no quota until a balance is struck. § 112, n. 20. *v.* Land. Partnership creates implied powers to carry on the business. *v.* Liability. Power

of liquidation to a partner, coupled with an interest, is irrevocable. § 187. *v.* Liquidation. Power of mining partner measured by the business. § 15, n. 4. *v.* Mining Partnership. Partner may sign his co-partner's name, or select a firm name. § 17. *v.* Name.

PREFERENCE

Of firm creditors. The priority can be explained only by the joint tenancy of the partners. The credit theory which charges the fund, because it is the proceeds of sales made by the creditors to the firm, is misapplied at the Common law, where the sale transfers the title and makes the price an independent claim. Insolvency does not rescind the contract of sale, and restore the property to the seller. At the Roman law the sale was conditioned upon payment of the price, and the failure to pay might raise an equity to follow the proceeds into the fund. The debt of a partner charges both his joint and his separate estate. His debt not contracted in the business, charges only his separate estate. The separate estate is charged in each case, the joint only in the first. The joint creditor is confined to his firm debtor only in equity, and on the ground that he had two funds for the satisfaction of his claim. The regulation of his right by equity and making recourse to the separate estate depend upon an allowance of an equivalent for the partial payment received from the joint estate, led to the notion that the separate creditors had a right to the separate estate, similar to the joint creditors' right to the joint estate. Making the joint creditors share the joint estate with the separate creditors before they could touch the separate estate, seemed an acknowledgment of the separate creditors' right to the separate estate. § 107.

PRICE. Title to land results to firm from payment of price. § 112, n. 7. *v.* Land. *v.* Consideration.

PRINCIPAL AND AGENT. *v.* AGENCY.

PRINCIPAL. *v.* CO-PRINCIPAL.

PROBATE COURT. Its jurisdiction over a deceased partner's estate does not extend to the partnership account. § 216 & n. 1. *v.* Account.

PROCEDURE.

The firm is not recognized as a party in legal proceedings. The partners are the only parties. A firm could not aver citizenship and maintain suit in United States Court. § 76. Some States, however, permit the firm to be a party, e. g., California, Iowa, Nebraska, and Connecticut. But then the statutory process does not supercede the Common law form in which the designation is surplusage. In a suit against the firm the judgment is limited in the first instance to firm assets. A partner, it is said, cannot sue in his own name, as assignee of his co-partner; but he represents the firm, including his co-partner's interest, not less than his own.

If parties agree to sue and be sued in the name of an association, they cannot object, if sued in that name; though suit, if it involved the partnership account, would not be maintained. An infant need not be a co-plaintiff, as he might be charged even as plaintiff by a counter-claim. A nominal partner must be co-plaintiff if held out with the concurrence of the actual partners; if not, the defendant could not compel his joinder as co-plaintiff. A dormant should be a co-plaintiff, as only by his joinder could the defendant recover his counter-claim. The ostensible partners when sued cannot compel the plaintiff to join the dormant partner as co-defendant, because they are liable on the contract as they made it. The Common law rule which still obtains in England, was that the non-joinder of a dormant partner, though unknown, discharged him. It was an unconscious election. The effect of an enactment requiring the parties in interest to join, was to compel the joinder of a dormant partner under all circumstances. A special partner may, it is said, join as a partner on account of his interest, though his control is suspended during partnership; but this may be doubted, for judgment against a special partner would bind his separate estate. If the use of a fictitious name is prohibited, the partners using it may nevertheless recover, unless credit was acquired by the name. A firm could recover the price of merchandise for negligence of carrier, for rent of building, and enforce clerk's bond for faithful performance. If a certificate is required as a preliminary, it must be filed, or suit can not be maintained; but the firm may assign the claim, or recover for a tort without a certificate. The effect of trading in name of individual partner varies in different States. In Pennsylvania the presumption is that the transaction was on behalf of the firm; in England, and elsewhere, the presumption is that the transaction was on individual account. If the individual name is the designation of two firms, the creditor may hold either. The separate creditors rank as joint creditors in the distribution of the assets. This confirms the Pennsylvania view that all transactions are on firm account. Partnership can exist without any designation. The designation is surplusage and the individuals are the partners. § 76. English statute which permits suit against any but parties to bills and notes, excludes partner. *v.* Commercial paper. The Common law did not adopt the Civil law process, nor enquire what it was. The Civil law process resembles the Common law remedy for torts. The remedies are concurrent, or successive and cumulative. If judgment is against the firm alone, it can be enlarged so as to bind the partners, except where they have a personal defence. The English have recently tried to introduce the Civil law method by judicial orders under the Judicature Act. But the Common law method has not been superceded; it still subsists beside the new method. The effect of the construction put upon the orders is that the partners at the time the debt was incurred are the parties to the suit, and a judgment against one merges the cause of action, and releases the others, exactly as it did before the orders. This construction makes the new process as ineffectual as the old. The pro-

cedure under the joint contract frustrated a recovery. § 77. If any defendant confessed judgment, or gave a specialty to plaintiff, or he recovered judgment against one or more, he extinguished his claim against all others. Although the plaintiff could not effect service upon all, his inability did not make any difference; the non-served partner was relieved from the liability by the judgment against the served. This result was worse in Pennsylvania than in England, because the English had the process of outlawry, and the non-served partner's goods could be taken. § 81. In correcting the procedure Pennsylvania began by preventing the judgment in joint actions from merging the claim against the non-served partners. § 82. Other States, e. g., Rhode Island, North Carolina, Maryland, Iowa, South Carolina, and Michigan, corrected the procedure. If the action was not joint, the Pennsylvania statute did not relieve the plaintiff. If he took a confessed judgment the cause merged, and the other partners were released. A specialty or death extinguished the claim. § 83. If, however, the suit was joint the judgment did not merge the claim. The acceptance of service was no objection, nor no return by the sheriff as to the non-served partner. But the fact that the plaintiff did not know of another partner's existence, and was kept from knowing it by the dormant partner, was no excuse for not joining him. § 84. The legal reason given for this decision was that the Statute of Limitations would be frustrated! But it does not run until discovery, especially when knowledge was prevented by the defendant. The legal excuses for the nonjoinder of a defendant were infancy, discharge in bankruptcy or insolvency, absence from the jurisdiction, or lost by statute. If the judgment is in a different State the enforcement is regulated by the law of the forum. § 84. Originally the claim was joint and several in equity. § 85. Now equity would not open the judgment to let the plaintiff bring in another partner, not even if a dormant partner. Death extinguished the claim against the deceased partner's estate. Death carried the claim over against the survivor, who alone was liable to pay it. § 86. Equity relieved the plaintiff only, if the legal remedy is exhausted, and deceased was not a surety. Then there was no joint remedy against surviving and representatives of deceased partner. There was no remedy at law, and a remedy in equity only after the legal remedies had been tried and produced nothing. § 86. If a partner died pending suit, the plaintiff proceeded against the surviving partner alone. § 87. The plaintiff could not join the executors of the deceased partner, even for conformity. If the surviving partner confessed judgment the claim was extinguished. If the executors were made parties, they would be disregarded as parties, and as suit would be between plaintiff and surviving partners, joining executors of deceased would not disqualify surviving partner as a witness. Pennsylvania provided against this extinguishment of the claim by the death of a partner. It gave a direct recourse against the deceased partner's estate. § 88. The creditor can recover against either surviving or deceased partner, and judgment for survivor don't bar suit against deceased, and recovering a

judgment against surviving don't prevent recourse to deceased's estate. The interpretation of the Pennsylvania statute is not that the burden of proving insolvency of the surviving partner, and no firm assets is shifted to the defendant. That question of equity is excluded altogether, and a legal right is given against the deceased partner's estate. If a partner dies pending suit, the statute provides that the suit shall proceed against the deceased partner alone. The plaintiff may either bring a new suit or suggest the death and proceed by substituting the executor, or administrator. Statute of 1836 enables courts to frame a suit in which executor, or administrator, should be joined; but a statutory provision is unnecessary, for practice justifies the process. Other States have enacted provisions like Pennsylvania, e. g., Rhode Island, Mississippi, New Jersey, Tennessee, Vermont, Maine, Minnesota, Wisconsin, Kansas, and Maryland. A direct recourse is now conceded in England, and the right admitted. At Common law, if a partner died after judgment against himself and his co-partners, a *sci. fa.* would not lie against the deceased partner's reprsesentatives, although the surviving partner is insolvent. § 89. In order to rectify this defect, Pennsylvania passed an act to bring in the representatives and prevent judgment from being a bar to subsequent suit against other partners. Other States passed acts to this effect, e. g., Minnesota, Kentucky, Maryland and Michigan. § 89. The severance of the judgment severed the cause of action. In a suit against the executors of a deceased comaker, who was surety for the other makers, of a promissory note, the defence of suretyship was of no avail, because there was an independent cause of action against the deceased partner's estate. § 90. If the plaintiff releases a partner, the effect is an extinguishment of his quota of the joint debt. The plaintiff could stipulate to release the partner altogether, it is said, and yet retain his right to recover the full amount for his co-partners, but this would be unjust. Statutes have enabled the plaintiff to compound and release a partner without releasing his co-partners, e. g. Pennsylvania, Kansas, Michigan, California, Minnesota, New Jersey, Ohio, Rhode Island, South Carolina, Vermont, and Virginia. Distinction between the joint and the joint and several contracts. *v.* Contract. Severance of process. *v.* Contract. The Scotch did not follow the English procedure; they adopted the French process, which is the general Civil law course.

For account. *v.* Account. The partners are the parties to any litigation by or against a firm. Hence no partner can sue or be sued by his firm, for if this were permitted he would appear as both plaintiff and defendant in the same case. As a consequence of this form of the process, no debt can be collected by the firm of a member, or *vice versa*, and such claims are excluded from the assets of either the joint or the separate estates. § 160. A Pennsylvania statute permits partners to be both plaintiffs and defendants in the same action. § 161, n. 1. The courts, in construing the act, limited its operation to a seizure of firm property, and did not give it any effect to take the separate estate of a partner in execution. § 161, n. 6. It provided a remedy for suits between firms with a common

member. The act does not enable a partner to sue his firm or his co-contractors, but is construed to require an independent plaintiff, who is not also liable on the contract which he is entitled to enforce. § 161, n. 2. There is, however, no difficulty in a joint contract being enforced by one of the joint contractors against his co-contractors. The intention to enable one to recover his claim, in spite of his being in form one of the contractors who agrees to pay it, furnishes the interpretation. § 161, n. 4, 5. The effect of allowing suits between firms with a common member is to limit execution to the firm assets. § 161, n. 7. Redress is not confined to legal procedure, but may be equitable, and the remedy in equity is not superceded by a statutory process. The obstacle, however, does not come from procedure, but is inherent. The common member must be made either plaintiff or defendant, and neither position is compatible with his twofold membership, which requires a settlement of his interest in both firms. § 163. It is only through a settlement of the accounts of both firms that the ultimate balance can be ascertained, and his portion of it. § 164. If partners could set-off against each other the debts they owed the firm, as decided by McCormick's Appeal, the distinction between joint and separate estates would be unsettled, and made to depend upon the account. § 163. The Common law does not admit capacities in an individual, and the faculty was acquired in partnership by means of the joint estate. § 164. The common member seems to be acquiring distinct capacities by means of the different trades he undertakes. § 164, n. 1. Different firms composed of entirely the same members are always treated as a single firm, no matter how far apart they transact business. § 164, n. 2. Thus, a general lien in one branch covers the assets in the other. § 164, n. 3. A partial identity of members gives less title to recognition. § 164, n. 4. A trader did not obtain distinct capacities by reason of his different business undertakings. It was only the slave who had a separate recognition in each business, because he had no *caput*. § 164, n. 5, 6. 7.

PROCESS. *v.* PROCEDURE.

PROFESSIONAL REPUTATION, not part of good-will. § 209, n. 1 *a*.

PROFITS.

Partnership in the profits and not in the stock. *v.* Partnership. Sharing profits indicates a partnership. It shows that the title belongs to the participants. *v.* Property. By virtue of his ownership he takes the fruits of his property. This is the original doctrine, and, though misunderstood and misapplied, is true to-day. § 52. That profits result from ownership, and not from partnership, appears in this: The title to profits is a separate right, which arises only when the joint title ends. The several owners then become entitled to the profits. Before that severance the partners are owners of assets, but not of profits. Profits are co-extensive with trade, and as partnership is an agency of trade, the result of its function

is profits. All trade is undertaken for profit. Sharing profits during partnership is accounted for not as a right, but as an indulgence. There could be no enforcement of it. An action would not lie by a partner against his co-partner, and a bill would end in a dissolution. The proprietorship affords a facility in proving a partnership, because it shows that one interested, or acting, as a proprietor is a principal in the business. § 53. It might be impossible to prove him a principal, except through the property identification. The services of others are not capitalized, and they are not made partners by sharing the profits, because the acceptance of the services as an equivalent for a material contribution depends upon the agreement of the partners. The fact, however, that contribution may be in services will charge the one rendering services as a partner if he acts as a partner, and *inter alia* shares the profits, unless he can disprove that he acted as a partner, and show that his conduct was consistent with the position of a subordinate employé. The profit-sharing is explained by virtue of the title of ownership. *v.* Property. No one but a proprietor can take profits. Hence the inference of partnership from sharing profits. If, however, the arrangement lets a non-proprietor take profits, it must be by a delegation from the proprietor. By disregarding the proprietor's appointment by which the appointee took profits, it resulted that the distinction between sharing by a proprietor and by a non-proprietor was overlooked, and both profits and property were excluded as evidence of partnership. § 54. Profits are not independent of firm property. They are the increment of the contribution, and form part of it. No one could claim profits who could not claim a contribution. Profits are not, like the contribution, a fund on which creditors rely for payment. Profits do not exist as such until the debts are paid. The word has no meaning, except between partners. This was first pointed out by SULPICIUS. The profits could not, as a part of the contribution or assets, be said to belong to the creditors, so that taking profits would deprive creditors of the fund to which they were entitled. The assets would belong to the creditors, and a withdrawal would be a fraud on them, but the profits would not exist. The proprietors would be charged, because they took the assets away from the creditors; the withdrawal would charge them, but they would not be charged as proprietors because they took profits included in the assets. That reasoning would establish an anterior liability, whereas the liability for a withdrawal is subsequent, and presupposes a prior liability. The question of proprietorship is in dispute, and the liability for a withdrawal begs the question by assuming a proprietorship. § 55. At the Roman law, the profits and the contribution correlated at first in fact, and then in theory. At the Common law, they are presumed to correspond in default of evidence. § 56. Not inconsistent with the theory of firm having only the use of the contributions. *v.* Contribution. History of profit-sharing as evidence of partnership. *v.* Evidence. Amount of profits stipulated for loan. *v.* Evidence. By general law, profits are equivalent to the property. § 57, n. 4. Partnership in

profits and not in the stock, a misnomer. § 27. Profits made by use of trust funds. *v.* Trust Funds.

PROMISE TO BECOME PARTNER. *v.* HOLDING OUT.

PROOF OF PARTNERSHIP. *v.* EVIDENCE OF PARTNERSHIP.

PROPERTY.

At the Common law property partook of the nature of bailment. The title was to hold, not to sell. If anything else than tenure was claimed, it must be proved and would not be inferred. Thus, when disposition was established as an incident of title, if the proprietor authorized a sale, this did not include a pledge. The authority was express to do something, e. g., sell, which was not originally involved in the idea of property, hence the authority was limited to its terms. There was a difference of opinion upon this inference of authority, arising from a general delegation, as is seen in BRACTON'S inference of contracts for service from the power to manumit and enfeoff. § 4.

Property affects the question of partnership, because it is the medium through which the partners are connected, and because it forms the substance of their transactions. § 51. Property is, therefore, the distinguishing trait of a partner. The co-proprietor in trade is a partner. The profits only point him out, because the proprietor has a title to the profits. *v.* Profits. If the firm business does not require ownership, then the acts by which the partners exert all the powers they have, are equivalent to proprietorship. If one acts as owner, this is proprietorship as to third persons. This effect does not follow at the Civil law, because no one but the contracting party is bound. The party interested must seek his redress from the contractor, and the contractor must look to the interested party for contribution. At the Civil law, there is no undisclosed principal or dormant partner who can be sued. Profits are an increment of the property contributed, and sharing is an indication of the partner. *v.* Profits. It is the property which gives the partners mutual agency. They buy and sell it. The agency is implied from the function they undertake. Agency is a result of partnership, not a cause of it. Buying and selling property together would not prove the traders co-principals if the property element was excluded, for they might be co-owners of the property and of the profits without considering themselves co-principals. They would be independent principals, and each liable for himself, but not for each other. This is the doctrine of Chaffaix v. Lafitte, and Eastman v. Clark. The creditors could hold them jointly only by proof of their intention, which is a secret, to be joint principals in the transaction. Sharing profits as proprietor, or as non-proprietor. *v.* Evidence.

The title required for firm property was a mutual restriction of ownership, short, however, of total association of title. § 97. Joint tenancy answered to bridge over the gap between communal holding and modern

individual title, by the fiction of a single title. Trade added the power to dispose of the joint property, as the Feudal joint tenancy was limited to holding the property. § 98. Joint tenancy was adapted to commercial purposes. Survivorship continued, but it was limited to the duration of the partnership. The separate titles of the partners, though recognized, were postponed until the expiration of the partnership, when the joint title was severed. The power of sale arose from the joint estate, not from mutual agency. § 99. It results from making the joint estate the source of the partner's powers that firm creditors have a legal priority over the separate creditors of a partner. The right is not founded upon an equity, but has a legal basis. The joint creditors would not have a preference if the partners were tenants in common, because the titles would be several, although the possession was joint and the possession would be according to the titles. § 100. This would benefit the separate creditors. They could seize and set apart each partner's quota of firm stock, in spite of the co-occupation. The firm creditors would be separate creditors of each partner, and on a distribution all would come in with the separate creditors. The only difference between joint and separate creditors would be that the joint creditors would compete for each separate estate, while the separate creditors would be limited to their single debtor. The joint creditors would exclude the separate creditors, if the title was joint. Neither partner could charge the joint estate, except by a firm transaction, and the creditors in firm transactions would hold the estate as a pledge. The joint creditors have in addition an equal right with the separate creditors to each partner's separate estate. Title and claim survive upon death of partner. *v.* Estate. The joint estate prevents any debts, unless in the course of business, and enables firm creditors to enforce the prohibition. § 106, n. 1. A partner's sale of his share is subject to the debts; if to a co-partner, and intended to sever the joint title and convert it into co-partner's separate estate, the sale is a fraud upon the firm creditors. If all the partners join in selling, the creditors may assert the joint title, or make the partner exert his right for their benefit. § 106, n. 1.

PROPRIETOR. *v.* PROPERTY.

PROTECTION, MUTUAL. *v.* GAIN.

PURCHASER from partner of land, not of personalty, takes title, unless he has notice of firm title. § 110.

PURCHASERS. *v.* Joint purchasers. Purchaser of partner's share interested only in liquidation. *v.* Execution. § 181. *v.* Settlement. § 206, n. 2. *v.* Advance.

PURCHASES.

If each partner bought on separate credit, the seller could hold the firm. The firm is the undisclosed principal, and is liable for the price. Purchases for contribution. *v.* Contribution.

PUNTSCHART, Dr. Civil law indivisible contract. § 91, n. 3.

QUALIFICATION as Partner for Incorporator. *v.* Incorporation.

RAISON SOCIAL. *v.* NAME.

RATIFICATION.

Act must be on behalf of principal, hence, incoming partner cannot ratify. § 144, n. 2 & 7. Binds principal, if act done in his name, though he received no benefit and without a new consideration. § 135, n. 1. Previous but not subsequent authority would charge an undisclosed principal, who enforces the contract through the agent. The ratified contract makes the principal independent of agent, and not subject to equities between him and the other party to the contract. The intention to be a principal cannot be ratified; nothing but a new contract will bind him. § 135. Partner's act in excess of his authority binds him, but not his co-partners, unless they adopt it. § 135, n. 2. If on behalf of all, all must ratify, or no one will be bound. § 135, n. 3. The enlargement of the business, like its creation, requires the constituent authority of all. § 135, n. 4. Partner, who does not join in executing specialty for the firm, may be bound: 1, By express authority to co-partner to execute specialty in his name. 2, By his presence at the execution without dissent. 3, By subsequent ratification. In these cases he is bound by the covenants. In the first case precedent authority, and in the third subsequent ratification may be given by parol. § 135, n. 5, 6. 4, The act may be authorized, but not by seal. The principal is bound by the contract, but not by the covenants without a previous authority by deed. § 135, n. 7. The argument for a partner to bind his firm by specialty, because he can by commercial paper, is misplaced. Commercial paper is governed by principles in conflict with partnership principles. § 135. Infant's ratification by continuing business. *v.* Infant.

RECEIVER.

A partner will not be superceded, unless for cause, by a receiver. The firm saves the expense, and has the partner's experience. An owner has the right to prevent waste by his co-owner, and security would be required, e. g., for injuring printing office. If liquidation cannot be effected by either partner, the business will not be sacrificed, but put up at auction among the partners. § 180. As the vendee of a partner has no right of joint control, but only a right to enforce a settlement, the appointment of a receiver is a matter of course against him. § 181. Laches will deprive a partner of his right to demand the appointment of a receiver. § 182. Will not be appointed to displace liquidating partner, without cause. § 190. *v.* Liquidation. A receiver is not appointed for a mining partnership as readily as for a commercial partnership. § 15, n. 2. *v.* Mining Partnership.

RECORD-SYSTEM in Pennsylvania supercedes marshalling real estate. § 113. v. Land.

REDFIELD, Judge. Partner's equity enures to firm creditors, and separate creditor no right, unless surplus for him. § 106, n. 8, c.

RELATION, Partnership by. v. Option. Relation between partners by consent. v. Choice of Partner.

RELEASE

By partner binds his co-partners only if he receives payment. § 117, n. 2. Creditor, by statute, may release partner and retain right against co-partner. § 90. v. Procedure.

REMEDIES. v. PROCEDURE.

RENAUD.

Achilles. By Law Merchant, contribution the limit of partner's liability. § 3, n. 1. Contribution a debt, § 33, and limited liability in special partnership confined to partners taking no part in the management. § 37, n. c. Set-off. § 77, n. 1, b. § 130, n. 11. Assignment by partner to co-partner. § 130, n. 1, b; § 130, n. 8, b, 11, 12.

REPRESENTATIONS

Of Partnership. v. Holding Out. Partner's receipt for merchandise not delivered binds co-partner if third person relied on his representation. § 139, n. 2. v. Tort.

REPRESENTATIVES, Personal. v. EXECUTOR.

REPUTATION. v. Holding Out. Professional, not part of good-will. v. Good-Will.

RESTITUTION. v. TORT. v. TRUST FUNDS.

RESTRICTION

Of partner's power. v. Powers. Notice to third persons revokes co-partner's implied authority. v. Powers. Partner's restriction will not deprive co-partner of power to buy stock, unless enforced by partner who returns goods. § 115 & n. 3. Restriction to firm business is imposed in order to prevent the unlimited liability from charging the separate estate. § 116. v. Powers. Continuing may set off debt of retiring partner. § 48, n. 3. v. Set-Off.

RETIRING PARTNER.

v. Change of Partners. Sale of his share entitles continuing partner to liquidation. § 186. v. Liquidation. Retiring partner may enforce agreement to pay firm debts. § 147, n. 2. v. Marshalling. Liability founds his equity. § 147, n. 1. v. Marshalling. Notice by retiring partner makes him surety in New York. v. Change of partners.

RHODE ISLAND corrected Common law procedure. § 82; § 88. *v.* Procedure.

RIBBENTROP. Indivisible contract of Civil law. § 91 & n. 3.

ROGERS, Prof. Henry Wade. Firm creditors excluded from competition with separate creditors for balance of debt. § 109, n. 8.

ROMAN TYPE

Of partnersnip. *v.* Profits. Roman law distinction between co-ownership or sale and partnership. *v.* Sale. Civil or commercial contract. *v.* Contract. Not affected by tenure and partnership in holding, or in selling according to contract. § 67, n. 7. Roman partnership a bargain between the partners. § 1. *v.* Partnership. Partner acquired capacity by a trade only if not *sui juris.* § 164, n. 5, 6, 7. At Roman law, profits and contributions correlated at first in fact, and then in theory. § 56. Roman law analogy of sale used to account for firm stock. § 107. *v.* Preference. Contrast between Roman and Common law sale. § 67. *v.* Sale.

ROUSSEAU.

French civil partnership not confined to profits, but extends to any benefit which can be estimated in money. § 16, n. *a* & *b*. Contribution, an advance. § 31, n. 3. At Civil law, parties to contract alone liable, § 51, n. *b*, and no undisclosed principal. § 51, n. *c*.

SALE.

A sale might be a substitute for partnership. A shipment was made for the joint account of owner, carrier and consignee, who became co-owners. The division was a sale, and advance on original owner's share a payment; recoverable if more than received for it. § 67. So, sale of trees for one-half profits of cultivating them during life of trees. § 51 n. 1. The raw product could be sold to a manufacturer for a corresponding share of the manufactured product. This was the case of farmers who sold milk and received cheese. This is in contrast with the Roman law. The partnership was in selling alone by Roman law, and the partners would be co-owners of the price. At the Common law they would be co-owners of the property and not be made partners by the sale. § 67. Partner's power to sell. *v.* Powers. A sale by a debtor to his creditors. § 59. Analogy of sale at Civil law to create a firm stock. § 191. *v.* Marshalling. Partner's right of disposition over his share. § 171; if absolute, a dissolution; if qualified, not. § 171, n. 2. Alienation not accompanied with delivery, but carried out in equity. § 171, n. 3; § 172. Partner may sell his share of real estate, though no quota. § 112, n. 20. Analogy of sale at Roman law accounts for firm stock. § 107. *v.* Preference. Partner's sale of his share to defraud creditors, or sale by all partners, enables creditors to assert joint title. § 106, n. 1.

SCHMIDT, Fred. Gus. Ad. Partnership in middle ages a family relation. § 2, n. 1.

SCOTCH PROCESS. § 96. v. PROCEDURE.

SEAL. Partner cannot bind the firm by a seal. § 117. v. Powers. But if express authority, the seal will be disregarded. § 118. v. Powers.

SELBORNE, Lord. Judgment against partner unconscious release of co-partners. § 77, n. 3.

SEPARATE CREDITORS

Postponed to joint creditors by joint estate. v Property. v. Estate. Lien for partner's advance don't extend to advance made co-partner and cut off separate creditor's preference. § 165, n. 1. v. Advance. Partner's acceptance of draft on firm does not enable holder to prove against his separate estate. § 126, n. 2. v. Commercial Paper.

SEPARATE ESTATE. v. PROPERTY.

SEPARATE PURCHASERS. v. JOINT PURCHASERS.

SEPARATIONIS JUS. § 164. v. *STATUS.*

SERVICE

Limits extent of judgment. § 122, n. 2. Service required by statute. § 76. v. Procedure. Services capitalized if accepted as a contribution. § 54. v. Profits. Set-off of non-served partner's claim. § 130. v. Set-Off.

SHARING Profits. v. PROFITS. Sharing Losses. v. EVIDENCE.

SET-OFF.

v. Contract. In Pennsylvania any liquidated claim may be set off. Equity disregards procedure, and permits a set-off whenever the defendant has a claim against the plaintiff, although no action could be brought on the claim. The Common law ignored the interest as the ground of set-off, and adhering to the technical form, did not permit a partner to represent a firm claim, even by assignment. § 130, n. 1. The partner's liability in his separate estate for a firm claim, entitles him to set off a private claim against the plaintiff, rather than pay the plaintiff's joint claim, and then sue him for the private claim. The firm has no right to compel the partner to make the set-off, for that would be to enforce an additional contribution. If made, it is an advance. No assignment by the partner is requisite. *Contra* Civil law. § 130, n. 2. The right does not depend upon contribution, but contribution follows from the advance on behalf of the firm. § 130.

1. Partner sued for a firm claim may set off a firm claim without co-partner's permission. The set-off avoids circuity by anticipating the contribution which co-partner would be compelled to make if partner

paid the debt out of his separate estate. This is also the Civil law. At law, separate could not be set off against joint claim, or *vice versa*, but set-off is an equitable medium. § 130, 4, 5, 7.

2. A partner sued alone, or with co-partner for a firm claim, can set off his individual claim. He owes the debt none the less, because his co-partners also owe it. § 130, n. 6.

3. A debtor sued by a firm cannot set off a claim which he has against one partner. The partners own jointly, and no part belongs to a single partner. Hence, a separate debt is not payable out of firm property. This is German Code and Civil law practice. § 130, n. 8, 9.

4. The partner may set off a firm claim against his individual debt, if his co-partners consent. The co-partners can pay a partner's debt if they like. § 130, n. 10. RENAUD'S opinion that partner has implied authority to use firm claim. § 130, n. 11.

5. Defendants may set off a firm claim against a partner's separate suit. The partner is individually liable for the firm debt, and the defendant may enforce the liability by set-off. §130, n. 12. Also Civil law.

6. A surviving partner cannot set off a firm claim against his individual debt. Although all rights survived, yet the beneficial interest resulted to the deceased partner's representative. The surviving partner is in reality a liquidating partner, and the application would be a misappropriation, unless made with the consent of the deceased partner's representative. The death of partner introduces equality of distribution, and prevents any subsequent set-off which would result in a preference. §130, 13, 14, 15 & 16.

7. A partner sued for a firm debt can set off his co-partner's claim against the plaintiff, if the co-partner consents. The defendant represents the co-partner's interest in firm property. If offered by co-partner and refused, partner could not subsequently claim contribution. If partner has paid more than his proportion, it is important for him to compel co-partner to let him use it. § 130. The indemnifying partner may set off the indebtedness of the outgoing partner. § 148, n. 3.

Set-off between partners forms item of account. *v.* Litigation. Defendant may set off deceased partner's debt in suit by surviving partner. § 96, n. 1. *v.* Contract. Partners cannot set off against each other what they owe the firm, because creditors are paramount and may collect both. § 202. *v.* Marshalling. Firm creditors cannot set off payment of individual partner's debt against *bona fide* holder of firm paper. § 167, n. 5, *a*.

SETTLEMENT.

Interpreted according to partnership principles, § 215. Must be proved. § 215, n. 1. Completed, is binding. § 215, n. 3. May anticipate account. § 212. Suit for, and suit after, barred by limitation. § 213. *v.* Account. Should carry interest. § 165. Purchaser of partner's share entitled to. § 206, n. 2. *v.* Advances.

SEVERANCE

Of title enforced by construction, to give effect to exemption granted by Constitution, or to compensation decreed by statute for negligence. § 104, n. 2, 3. Severance of joint contract. *v.* Contract.

SHARSWOOD, C. J.

Corrected C. J. GIBSON'S error, and traced partner's equity to his liability. § 102, n. 2 & *a*; § 106, n. 5. Re-discovered by legal instinct the nature of partner's contribution. § 34, n. 1; § 102, n. 2. Credit on record-title in Pennsylvania. § 113, n. 5. Notice of dissolution. § 177, n. 1.

SIMPSON, C. J. Joint creditors have priority on firm estate and equal right with separate creditor against individual estate. § 108, n. 5.

SISTER STATE JUDGMENT. *v.* JUDGMENT.

SLAVE, carrying on different trades. § 101. *v.* *STATUS.*

SMITH, J. Guarantee by partner. § 129, n. 3.

SMITH, Jeremiah, Esq. Special partnership the acknowledgement of limited liability. § 26, n. 5.

SOCIAL CLUB. *v.* GAIN.

SOLICITORS, INVESTING. § 139, n. 2. *v.* TORT.

SOUTH CAROLINA

Prevents judgment against one partner from merging claim against co-partners. § 82. *v.* Procedure. Release of partner, not of co-partner. § 90. *v.* Procedure.

SPECIAL PARTNER.

Not joined as party in legal proceedings. He may, it is said, join, but judgment would bind his separate estate. § 76, n. 14. *v.* Procedure. A special partner's share could not be taken in execution, it was said, because the sheriff could not seize anything in which the special partner had an interest. The stock belongs to the general partners, who have the exclusive right to its possession and control. The special partner might have a chose in action or a claim, but not a property interest in the stock. § 104, n. 7. This ruling shows the kind of treatment to which the special partner is always exposed. *v.* Special Partner. Tort of general, charges special partner who has failed to observe statutory requirements as construed by the courts. § 142. *v.* Torts. Beneficiaries of deceased a partner. Special partnership by inheritance. *v.* Execution.

SPECIAL PARTNERSHIP.

Special partnership is a kind of partnership. It expresses the principle of partnership at the Civil law, and is a form of the relation. But

it is opposed to the Common law, which charges a dormant partner on account of his property interest, as well as an active partner, with liability. Special partnership conflicts with the Common law theory, and if recognized, supercedes to the extent it reaches the dormant partnership. § 3. Special partner's contribution. § 37. *v.* Contribution. A special partnership should be encouraged, because the managing partners are liable to the extent of their resources. This liability restrains them from speculation and risk. The members of a corporation are all exempt from unlimited liability, and the officers incur no personal liability. They speculate with the property of others without individual risk. The discouragement given by the courts to special partnership did not curtail the limitation of liability; it had the opposite effect, and extended the immunity by legislation. The result was that the Legislature made no discrimination and exempted all incorporators, instead of exempting only those who took no part in the management. There was a further result. The exemption of all incorporators made the joint stock company seem like a corporation. The distinction between a private and a public enterprise was obliterated, and a franchise was granted for a private undertaking. The State, in weariness, abandoned the granting of charters, and allowed self-incorporation. Thus, the State has deprived itself of its prerogative, and cannot grant a franchise for a public use when it is necessary. The courts show favor to corporations, even if illegal and disfavor to special partnerships. If a corporation is sued, the plaintiff must prove its failure to comply with the statutory requirements. If a special partner is sued, he must prove that he has complied with the statutes. The scope of the special partnership statutes is simply to notify third persons, who is the special partner, and the amount of his contribution. The special partnership is recognized as a type of partnership. A foreign special partnership is interpreted by the law of its domicil, and foreign process regulates actions where they are brought. The statutory requirements should be construed to preserve, not destroy, special partnership. Non-compliance with the terms, unless they are constituents of partnership, should not make the special a general partner. § 37.

SPECIALTY. Partner cannot bind firm by deed. § 117. *v.* Powers. How ratified. *v.* Ratification.

STATUS.

The sum of the rights and duties of the partners in the relation, is called the *status* of partnership. The *status* may be created by contract, like marriage or sale. The contract is the occasion or door, and the consummation or conveyance establishes rights *in rem.* Agency is not *status* and permanent, but is revocable. If the joint estate did not give partners a *status*, they could not withdraw the property from execution, issued by a separate creditor. A contract would not bind third persons. The *status* is recognized by excluding separate creditors until the firm is wound up. Among the civilians, KUNTZE suggests the joint estate as

the ground for the joint creditors' preference. §101, n. 2. HÜRLEMANN'S view is that the Roman law recognized no joint estate and no preference. A privileged creditor would be compelled to make out his priority. The French notion of a corporation he exposes as a makeshift, not applied, except to give the firm creditors a privilege, and then abandoned. The basis for the theory at the Roman law was the trading by a slave, who did not charge his master, and, therefore, could charge only the stock. This is inapplicable to freemen, who charge their person by all contracts and obligations. The extent of the segregation was only to limit creditors of slaves carrying on different trades to the particular trade they dealt in with them. That position was not recognized in a freeman carrying on different trades through an *institor*. There was no such classification of creditors or *jus separationis*, although that form of agency was fully developed at the Roman law. §101, n. 3.

STATUTE OF FRAUDS.

Third persons do not enforce the contract of purchasers of land on joint account by suing for the price. They do not proceed on the contract, but upon the authority delegated to the purchaser by his co-purchasers. The purchaser's bond and mortgage would not merge the vendor's claim for the purchase-money. It would be like the deed to him, subject to the rights of the co-partners. The Statute of Frauds requires a writing, and an oral partnership would be prevented by the statute. The obvious application of the statute is to a contract between vendor and vendee, but the Statute also applies to an agreement between joint purchasers. The vendor may seek by oral proof to enforce a written contract of sale against a partner of the vendee, or the vendee's partner may seek by oral proof to avail himself of a written contract to enforce a conveyance from the vendor. The statute prohibits the enforcement in both cases, if the contract between the vendee and his partner is executory. If the vendee's partner had paid his contribution, he could enforce the contract of sale. The contribution has made him a proprietor, and as such entitles him as an undisclosed principal to enforce the contract. If a partner sues the vendee, his right to recover depends upon the payment of his contribution. The payment raises a resulting trust to him. The universal doctrine of the courts is that a trust results to a partner from payment of the consideration. Nothing but a statute, as, for example, in Michigan, would prevent a trust from arising from a payment of the price. A partial payment of the contribution invests him with this right. It was thought at one period that a definite quota must be paid, but now any part will be sufficient to enable him to enforce the contract to the extent of his interest. A partner may be charged on an executed oral contract with the vendee. He is a full partner, and as such is liable for everything done in the course of the business. If the owner of land orally agrees to take a partner into business with him, the statute prevents the enforcement of the contract. The possession taken by the partner is not exclusive, and does not oust the

owner, who shares the possession. The statute was a substitute for the feudal investure which gave notice of the title. All the more if the possession could be explained by the business, which did not involve a disposition of the land as an asset of the firm, but was used for the site of business transactions. If an agent, to buy land for himself and others, buys for himself, opinions vary on the point whether the principals can compel him to convey to them or not. By most, payment of the consideration is regarded as the test, but by some the breach of confidence raises a trust by implication. The question does not affect partnership. The vendee is himself a principal, and his agency arises only after the formation of the partnership. The refusal to share with the co-principal is purely a breach of contract. A contract to share the proceeds of real estate is not affected by the statute. The proceeds made by a sale of land, or the product of its cultivation does not involve the title. § 10. The promise of the purchaser of firm assets to pay the debts is not within the Statute of Frauds. § 148, n. 9.

STATUTES.

Statute requiring joinder of parties in interest prevents dormant partnership. *v.* Procedure. Preventing suit against any but parties signing bills and notes excludes partners. *v.* Commercial Paper. § 121, n. 5, 7, 8, 10, 11, 12, 14 (1873, § 122, n. 4); § 161, n. 1; § 211, n. 2: § 161,

Alabama. Code of 1876, sec. 2904. § 30, n. 3.
California. Codes and Statutes of 1876, sec. 388–9. § 76, n. 1.
Civil Code, sec. 1543. § 90, n. 3, 4.
Colorado. Statutes of 1885, sec. 5. § 80, n. 2.
Connecticut. Statutes of 1875, p. 400, sec. 12. § 76, n. 1.
Dakota. Code of 1884, sec. 951. § 85, n. 1.
English. 384 Wm. IV. c. 42. § 84, n. 2.
28 & 29 Vict. c. 86. § 31, n. 1; § 55, n. 4, *a*; § 64, n. 3.
31 & 32 " c. 116, s. 1. § 16, n. 1.
" " " " (1868). § 143, n. 1.
36 & 37 " c. 66. Judicature Act and judicial orders under it. [§ 77, n. 2.
Illinois. Statutes of 1887, sec. 5. § 85, n. 1.
Iowa Code of 1884, sec. 2553. § 76, n. 1; § 80, n. 2; § 82, n. 1; § 94, n. 2.
Sec. 2550. § 80, n. 2.
Kansas. Compiled Laws of 1885 (1075), sec. 1, § 85, n. 1.
" " " (1076), " 2, § 88. n. 7.
" " " (1077), " 3, § 88, n. 7.
" " " (1078), " 4. § 80, n. 2.
" " " (1079), " 5, § 90, n. 4.
" " " (3626, 91–4) 1–4 § 90, n. 4.
Kentucky. General Statutes of 1881, sec. 8. § 89, n. 4.
Louisiana. Civil Code, sec. 274. § 79, n. 2, *a*; § 79, n. 2, *b*.

Ohio. Revised Statutes of 1884, secs. 3162–5. § 90, n. 4.
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Oregon. Civil Code, sec. 59, sub-div. 3. § 91. n. 2.
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Maryland. Revised Code of 1876, sec. 55. § 89, n. 4.
" " 1878, " 51. § 88, n. 7.
" " 1878, sec. 53. § 88, n. 7.
" " " " 54, § 88, n. 7.
" " " " 57, § 82, n. 1.
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Minnesota. Laws of 1873, c. 87. § 88, n. 7.
General Statutes of 1878, sec. 19. § 89, n. 4.
" " " " 37. § 90, n. 4.
" " " c. 66, sec. 266. § 88, n. 7.
Mississippi. Revised Code of 1880, sec. 1134. § 88, n. 7.
" " " " 1003. § 90, n. 4.
Missouri. Revised Statutes of 1879, sec. 658. § 85, n. 1.
Nebraska. Compiled Statutes of 1885, secs. 24–25–27. § 76, n. 1.
New Jersey. Revision of 1709–1877, sec. 3. § 88, n. 7.
Supplement to Revision of 1872–86, secs. 1–4; § 90, n. 4.
New York. Code of Procedure, sec. 1111. § 76, n. 13.
Revised Statutes, 728, sec. 51. § 112, n. 4, *a*.
Laws of 1853, ch. 281. § 76, n. 15.
North Carolina. Code of 1883, pp. 83–84 (4). § 82, n. 1.
Pennsylvania. Constitution of 1874, Art. III, sec. 7. § 37, n. 3, *e*.
Act of 8 March, 1775, 1 Sm. Laws 422–3. § 113, n. 8, *k*.
" 4 April, 1797, 3 " 297–8. § 113, n. 7. *j*.
" 13 " 1807. § 87, n. 3.
" 6 " 1830, P. L. 277. § 82, n. 1.
" 6 " 1830, " § 95, n. 3.
" 24 February, 1834. § 88, n. 6.
" 21 March, 1836, P. L. 243. § 26, n. 2.
" 16 June, 1836, sec. 3, P. L. 786. § 88, n. 5, 6.
" 14 April, 1838, P. L. 457. § 161, n. 1.
" 11 " 1848, sec. 4, P. L. 536. § 88, n. 1; § 89, n. 3.
" 4 May, 1852, P. L. 574. § 86, n. 1.
" 22 March, 1861, " 186. § 16, n. 1; § 88, n. 4, 6.
" 22 " 1862, secs. 1–5, P. L. 167. § 90, n. 4.
" 27 " 1865, P. L. 38. § 16, n. 1; § 95, n. 4; § 122, [n. 12.
" 15 April, 1869, " 30. § 121, n. 5.

Pennsylvania. Act of 15 May, 1869. § 87, n. 3.
" 6 April, 1870, 1 P. L. 56. § 64, n. 3.
" 9 " " " 40. § 121, n. 7.
" 8 " 1873, " 65. § 106, n. 8, *g*, *h*, *i*.
" 25 May, 1878, " 153. § 16, n. 1; § 121, n. 11.
" 9 " 1881, " 70. § 121, n. 8.
" 3 June, 1885, " 60. § 143, n. 1.
" 23 May, 1887, sec. 5, P. L. 158. § 121, n. 14.
" 27 March, " 38. § 121, n. 12.
Rhode Island. Public Statutes of 1882, sec. 29. § 82, n. 1.
" " " " 28. § 88, n. 7.
" " " " 1–6. § 90, n. 4.
South Carolina. General Statutes of 1882, sec. 397. § 82, n. 1.
Laws of 1888, " 1–3. § 90, n. 4.
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" " 1882, " 935. § 80, n. 7.
Virginia. Code of 1873, secs. 14–15. § 90, n. 4.
Wisconsin. Revised Statutes of 1878, sec. 2884, sub. 2. § 91, n. 2.
" " " " 2885. § 88, n. 7.
" " " " 3848. § 89 n. 4.

STOCK. A necessity in practice without reference to theory. § 191. *v.* Marshalling.

STORY. Opinion of ULPIAN's pearl case. § 63, n. 5.

STRACCHA. Insurance not partnership. § 16, n. 3.

STRONG, J. Partners not present may ratify deed of co-partner. § 135, n. 5, *a*.

SUBJECT-MATTER.

The domain of partnership is not confined to any commodities, it extends to all. § 8. *v.* Land. The relation of landlord and tenant excluded an agricultural partnership, but the parties are not prevented from farming in partnership; if they prefer to farm in partnership the law will carry out their preference. § 12 & n. 2. Sharing the profit and loss of the agricultural business, however, does not raise the inference of a partnership. Nothing would seem to subvert the relation of landlord and tenant, except a distinct agreement to farm in partnership. § 12.

SUB-PARTNERSHIP. § 68. *v.* CHOICE OF A PARTNER.

SUBROGATION.

v. Holding out. Creditors of deceased partner's representative entitled to subrogation to extent of deceased's contribution. *v.* Executor. Firm

creditors subrogated to retiring partner's place, if they renounce joint estate. § 200. *v.* Marshalling. By subrogation surviving partner and common member may escape payment, and enforce collection out of deceased partner's estate. § 203. *v.* Marshalling. If trustee-partner puts trust funds into firm, and they are used to pay firm debts, *cestuy que trust* will be subrogated to the place of the creditors paid. § 139, n. 5.

SULPICIUS. Profits not a fund for creditors. § 55, n. 2.

SURVIVAL of title and claims upon partner's death. *v.* Estate.

SURVIVING PARTNER

When entitled to compensation. § 210, n. 4, *a.* *v.* Advance. A trustee for firm creditors. § 192, n. 1. *v.* Marshalling. By subrogation escapes paying and enforces payment out of deceased partner's estate. § 203. *v.* Marshalling. Not assignee of deceased, but original co-tenant. § 121. Survivorship of title and claims incident to joint estate for duration of partnership. § 99, n. 1; § 103. In effect, a liquidating partner, and cannot set off firm claim against his individual debt. § 130, n. 13, 14, 15, 16. *v.* Set-off. Deceased partner's debt set off against surviving partner. § 96, n. 1. *v.* Contract.

SWIFT, Dean. Travesty of legal interpretation. § 37, n. 3.

TENANCY IN COMMON

Of firm property. *v.* Property. Judge GIBSON'S theory of partnership property was a tenancy in common, which co-ordinates all creditors, joint and several, not by classes, but as individuals. § 102. Joint title severed by execution. *v.* Execution. In New York separate execution severs title on the theory of a tenancy in common. *v.* Execution. Tenancy in common would break up the joint estate. § 100. For act in excess of authority. § 167, n. 1. *v.* Tort.

TENANT. *v.* LANDLORD AND TENANT.

TENNESSEE provides for suit against surviving and representative of deceased partners. § 88.

THIRD PERSONS, Partnership as to, the normal partnership. § 48.

THOMPSON, J. Partner by construction, not liable for co-partner's tort. § 142, n. 1.

THORNTON, W. W. Notice of dissolution. § 175, n. 2.

TITLE.

Title to contribution. *v.* Contribution. To profits. *v.* Profits. To firm property, *v.* Property. Title severed by Constitution or statute. *v.* Severance. Joint title resolved into several titles by dissolution. § 179. Title

vested in partner may be shown to be in firm. § 11, n. 1. Origin of firm's title. § 98, § 99. Title not devested from the firm unless by joint act of partners. § 167.

TORT.

If the acquisition of property was by a tort, the remedy at law originally was restitution, as it is now in Equity. But the legal process resulted in an obligation to pay an equivalent in money. This transformed the right and passed the title, substituting a debt for the property. The obligation to pay the price became a firm liability, which charged each partner and his separate estate. The tort, however, should not be assimilated to a contract. They are antipodes, and the result in partnership is to victimize the innocent partner for his co-partner's fraud, which is personal. § 48, n. 2. The firm which has failed to file a certificate may, nevertheless, recover for a tort. *v.* Procedure. Remedy for tort model for breach of contract. *v.* Procedure. A partner is liable for the tort of his co-partner committed in the course of the business, and for the damages caused by his tort. Withholding for a separate debt securities pledged with the firm, charges co-partner for the conversion. § 139, n. 1. Partner liable for receipt by co-partner for merchandise not delivered, if money lent on the faith of the representation. § 139, n. 2. A partner's contract for options in grain does not charge a co-partner, though that is the firm business. § 139, n. 3. A partner charges his co-partners by executing a firm judgment, if held an abuse of legal process. § 139, n. 4. If trustee-partner puts funds into the business, and debts are paid with them, the *cestuy que trust* will be subrogated to the place of the creditors who are paid. § 139, n. 5. The tort is erroneously assimilated to a contract. § 139, n. 6. But if the firm is only the occasion, not the agency, for its commission, the co-partners are not liable. A solicitor who invests without submitting the security to his client does not charge his co-partner, as the business of solicitors is limited to submitting proposed investments to their clients for acceptance or rejection. The business of a scrivener must be added to that of solicitors to control investment. Taking advantage of his position to induce a customer to withdraw an investment and entrust it to him, will not charge his co-partner for its loss. § 139, n. 2. The discharge in bankruptcy of innocent partner does not bar recovery for tort of his co-partner. The damages are converted into a debt, which charges both partners as individuals and their separate estates. §149, n. 3. Co-tort-feasors liable jointly, severally, and successively, whether partners or not. §140, n. 3; §208, n. 5. The libel of an editor will charge the proprietor, not because calumny is the business of a newspaper, but because the editor selects the materials. §140, n. 4. The libel must be identified with the business. A partner's vindictiveness, which might have vented itself anywhere, would not charge his co-partner §140, n. 4. Tort by converting trust funds. *v.* Trust Funds. A special partner who becomes liable as a general partner by his neglect to comply with the statute, is liable for the tort of his co-partners. It was thought

unjust to visit him with liability, because it was made out through two stages, but the real reason must have been the reluctance to enforce the finical construction given to the act establishing a special partnership. ⸹142. A partner's conversion of firm property to his own use, entitles his co-partners to reclaim the amount abstracted from his separate estate, and a bill lies for the restitution. ⸹166, n. 2. The separate estate need not be increased, for the appropriation is sufficient to charge him. ⸹166, n. 3. Nothing but the guilt is required. ⸹166, n. 4. The receipt of property is a reason to charge a stranger. ⸹208, n. 5. If the firm funds are used for a purpose beyond the partnership, the partners were made to recover separately. The act by a partner in excess of his authority created, it was held, a right of the co-partner to recover a moiety by a separate action. ⸹167, n. 1. A partner's use of firm paper for his individual debt was held to be a fraud, not on the firm, but on his co-partners, who must sue for their quotas of the loss. There was a dissent, because the title was in the firm, which should sue. ⸹167, n. 1. So, if a partner endorsed the receipt of his debt on a note held by the firm, they could not recover without admitting the credit. ⸹167, n. 2. Any receipt by a partner had the effect to bar the firm's recovery, because the partner could not be co-plaintiff. ⸹167, n. 2. But these rulings are erroneous. The injury was against the firm, and its title is not devested without an act performed on its behalf. It is the recipient who is estopped by the fraud, because he gave no value for the property to the firm. ⸹167, n. 3. If the firm debtor has credited the debt on his judgment against the partner, with his consent, the joint title is unaffected by the credit, and the firm may recover. ⸹167, n. 4, *a*. If a partner receipts for a firm claim in payment of his individual debt, the firm can recover in spite of his receipt. The firm title is not affected by the receipt. ⸹167, n. 4, *b*. If the partner transfers firm assets for his separate debt, firm creditors may recover them. The firm title did not pass. ⸹167, n. 7, *b*. If a partner's debt is paid with firm funds, the joint creditors cannot set off the payment against a note in the hands of a *bona fide* purchaser. ⸹167, n. 5, *a*. If the firm property is taken in execution for a separate debt and sold, all the partners can sue for the trespass. ⸹167, n. 5, *b*. If a firm note includes a separate debt the payee can recover on the note, but only the firm debt, not the separate debt, though included in the note. ⸹167, n. 5, *c*. It has been held that if the separate debt of all the partners is paid with firm funds, it cannot be recovered by the firm, because the debt was due from each of the partners, and they have no equity to recover it. ⸹167, n. 5, *d*. And if a partner pays his individual debt with firm funds, that his co-partner can be estopped from reclaiming the payment by receiving payment of his debt out of the firm assets. ⸹167, n. 5, *e*. If the firm is insolvent when its funds are used to pay the separate creditor, the firm creditors may recover, because the fraud is upon them. ⸹167, n. 7, *a* & ⸹103, n. 4. Partner, under liability for co-partner's separate debt, pays under duress. ⸹167, n. 8, *a*. If a partner gives firm paper for his individual debt, the

co-partner need not repudiate the transaction. He is not bound by the partner's unlawful act, which is invalid without being repudiated. §168, n. 1 & 2; §169, n. 1. The partners may consent after the appropriation of the credit or asset by a partner to his individual use, and the transaction will become valid. §169, n. 3. Partner may claim credit for a loss or injury caused by co-partner's tort. §210. *v.* Advances.

TRADE.

Trade is made up of the two operations of buying and selling, fused into a single act by the intention. Partnership came into the Common law as an organ of trade, and it was the trade-necessity that gave a partner the right to sell or pledge his co-partner's share. The Common law knew only joint ownership, or joint possession, and neither owner nor possessor could alien or mortgage his co-tenant's share, for only the title or possession was in common. Partnership has extended beyond trade; it has outgrown trade, and now embraces manufacturing, which is not a trade, but an industry, and extends to any 'business' which parties join in transacting. The original constituents of buying and selling need not co-exist in the business of partnership. Neither buying nor selling need be an element of the partnership business. There might be a partnership simply in the erection of a building, without any intention of selling the structure. § 11. The effect of extending partnership so as to include a business which is not trade, is to modify the principles of trade which regulate partnership. § 13. The actual requirements of the business undertaken, judged by its type, or kind, furnish the limit of a partner's power in a non-commercial partnership. This was the method by which a trade-partnership was developed from the principles of trade applied to joint traders. A partner in a sheep ranch could not sell the sheep or the ranch. Sheep-raising being the object of the partnership, no power is implied, except such as is necessary for that purpose. § 14. In a partnership to conduct a theatre, one partner could not bind his co-partner by a promissory note given in connection with the business. Commercial paper is not necessary for the management of a theatre. If lawyers are in partnership, neither can issue commercial paper. Profits co-extensive with trade. § 53. *v.* Profits. If trustee-partner puts trust funds into firm, and they are used to pay debts, *cestuy que trust* will be subrogated to place of creditors paid. § 139, n. 5.

TRADE-MARK. *v.* GOOD-WILL.

TROPLONG.

Insurance not partnership. § 16, n. 3. Cites STRACCHA. § 16, n. *c.* Nature of partner's contribution. § 33, n. 1. Cites CASSAREGIS for sharing profits and losses without partnership. § 51, n. *a.* Parties to contract alone liable at Civil law. § 51, n. *b.* No undisclosed principal at Civil law. § 51, n. *c.*

INDEX.

TRUST FUNDS.

If a partner uses trust funds in the business, the *cestuy que trust* may elect to take the profits earned by his money instead of interest. §42. This right cannot be founded on the trustee's agency. A legal investment is ordered and a speculation is prohibited by law. The violation of law in both aspects is a breach of trust. If the co-partners are aware of the trustee-partner's breach of trust, they become trustees *ex maleficio*, and liable with him for the profits made by the use of the trust funds. An eccentric notion obtains, which limits the profits to the trustee-partner's share derived from the use of the trust fund. Charging him for his co-partner's share would, it was said, inflict a penalty, and not simply make him account for what he has received. The theory is not tenable on partnership principles. To separate firm stock and apportion aliquot parts among the partners would work a *pro tanto* dissolution. The trustee-partner is made both a stranger and a member of the firm. The profits, as accretions, become firm assets, and can be taken only from the trustee-partner, who has no separate title to any part of them. The theory is also inconsistent with the partnership principle that the profits are derived from the aggregate contributions, and not from any part of them. The trustee-partner's contribution is equalized by corresponding contributions by his co-partners, and his share comes from the whole capital stock. HAMILTON has demonstrated this by figures. Take three partners with equal contributions and profits. Trustee takes 1-3: If 1-3 of each contribution, he would get the 1-3 out of his co-partners' contributions by reason of his contribution, so that he should account for the 2-3 on the same principle he does for the 1-3. A deduction or allowance is made for compensation to the firm for its management, before the trustee-partner is charged for his share of the profits. Although partners are not compensated, except through the profits, yet before they are charged for the profits the courts allow them compensation for services. The compensation is often guess-work. In Pennsylvania a rough estimate is made, and one-third of the profits is allowed for management. The difficulty of ascertaining the profits which are made by means of the trust funds, is no reason for not investigating the account. The court would abnegate its function, if it denied the right, and would put a premium upon the breach of trust. §43. The contribution does not become a fixed factor in the making of profits. It is a factor which varies with the kind of business, and must be calculated according to the business.

The theory of the Common law actions for taking property was restitution, but in time the process changed by accepting an equivalent in money for the property. Compensation became the standard of recovery. Following trust funds is a substitute for the early legal remedies. The funds can be traced only to the property increased by the funds, e. g., the firm assets. But the misstep of applying the maxim that the *cestuy que trust* may waive the tort and sue in assumpsit, repeated the Common law

substitution of a contract for a tort. The contract binds the partners as individuals, as well as partners, and thus enlarged the liability by charging the innocent co-partner for the embezzlement of his partner, as he had been charged for the damage of the partner's torts. The result is not important, because firm creditors can proceed against the separate estate, and thus indirectly enable the *cestuy que trust* to share it, by getting more out of the joint assets. §141. Trust imposed on incoming partner by receipt of assets. *v.* Change of Partners. Firm as purchaser for value of trust funds. §40 & n. 1. *v.* Lindley.

UBERRIMA FIDES. *v.* GOOD FAITH.

ULPIAN. Pearl case. §63, n. 3. Analogy of sale, argument for firm creditor's privilege. §108, n. 4, price being unpaid. §164.

ULTRA VIRES. Contracts of a partnership can be ratified, but not of a corporation. Act is excess of authority as *pro tanto* dissolution. *v.* Tort.

UNDISCLOSED PRINCIPAL.

Attacked as the Common law obstacle to the limited liability of the Law Merchant, but the precedent was too firmly established to be uprooted. §26. Owner of pearls in Ulpian's case. §63. No undisclosed principal at the Civil law. §57. Previous, not subsequent, authority requisite to charge undisclosed principal. §135.

UNLIMITED LIABILITY, a principle of the Common law. §44.

USURIOUS LOAN

Inconsistent with partnership. §66; §67. *v.* Evidence. Partner's advance at any rate of interest, being in part at the risk of the business, is not usurious. §165, n. 2. *v.* Advance. Usury excludes partnership. §66. Interest measured by profits, not usurious. §65. Risk of liability to creditors, not excuse for excess. §66.

VAVASSEUR, A.

In dealing with land, presumption against partnership. §131. Parties to contract alone liable. §51, n. *b.* Insurance might be carried on in partnership. §16, n. 5. Nature of partner's contribution. §33, n. 1.

VERMONT permits surviving and representative of deceased partner to be sued together. §88. *v.* Procedure. Release of partner, not of co-partner. §90. *v.* Procedure.

VIRGINIA. Release of partner does not release co-partner. §90. *v.* Procedure.

WAIVER.

The conditions made as preliminaries of a partnership, are waived by carrying on the business. §17, n. 3. Partner's waiver of co-partner's con-

tribution would not affect third persons. § 4. *v.* Contribution. Waiver of tort and election of contract. § 47.

WALWORTH, CH.

Partner's equity founded not on property, but on liability. § 106, n. 7. Deceased partner's representatives assert his privileges. § 106, n. 6.

WAR, Outbreak of, does not prevent commencement of partnership. § 17, n. 3. *v.* Commencement. Suspends partnership. § 173, n. 3.

WEIBEL, Jos. Leonz. Civil law indivisible contract. § 91, n. 3.

WESTBURY, Lord. Withdrawal by partners, unless solvent, a fraud on creditors. § 107, n. 5.

WETTER, P. Van. Civil law indivisible contract. § 91, n. 5.

WIFE, partner, employing husband. *v.* Evidence.

WISCONSIN severs joint cause of action, and provides remedy against any obligor. § 88. *v.* Procedure.

WITHDRAWAL

Of profits as a ground to charge one with the liability of a partner. *v.* Profits. Allotment by executor to beneficiary a withdrawal. *v.* Executor. Partner cannot relinquish his equity. *v.* Equity. By partner, while firm solvent. *v.* Marshalling. If withdrawal allowed for necessary expenses, the measure is the amount necessary to eke out maintenance, and the failure to withdraw for any year is an admission that it was not needed. § 208, n. 6. Partner having paid creditors, no lien on co-partner's land, conveyed in fraud of creditors in New Jersey, unless he has acquired a lien by judgment. § 208, n. 7. If partner withdraws all his capital, co-partner is entitled to the interest and to the profits. § 208, n. 8. The withdrawal by a partner, without his co-partner's knowledge, will stand, if not made in expectation of insolvency. § 192, n. 3. Withdrawal of contribution. § 28 *v.* Contribution. Allotment of share in deceased partner's estate to beneficiary, a withdrawal by executor. § 74, n. 8. *v.* Executor. Taking land for firm debt negatives a withdrawal. § 109, n. 6. *v.* Land. Deceased partner's estate could not be withdrawn on account of liability at law. § 204. *v.* Marshalling. Withdrawal of assets not ground to charge profit-sharer as partner. § 55. *v.* Profits.

WOODWARD, J.

Joint obligation of Common law not a business contract. § 79, n. 1. Set-off. § 130. n. 1. Partner binds himself individually by executing deed for firm. § 135, n. 2.

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